Supreme Court, U. S.
FILED
MAY 21 1979
MICHAEL RODAK, JR., CLERK

78-1747

In the Supreme Court of the United States

OCTOBER TERM, 1979

No.

UNITED STATES BREWERS ASSOCIATION, INC., et al.,
PETITIONERS,

v.

JULIO CESAR PEREZ, etc., et al.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on February 21, 1979.

Opinion Below

The opinion of the Court of Appeals is not yet reported. It is set forth in Appendix E as are the pertinent portions of the record before said court.

Jurisdiction

The judgment of the Court of Appeals was rendered on February 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

Whether the Court of Appeals erred in holding that the Butler Act, 48 U.S.C. Sec. 872, construed akin to 28 U.S.C. Sec. 1341, deprived the district court of jurisdiction to entertain an action to invalidate and restrain a discriminatory tax exemption alleged to be in violation of the Constitution of the United States and the Federal Relations Act, 48 U.S.C. 741(a)?

Whether the provisions of the aforecited anti-injunction statute are applicable where the action does not seek to invalidate or restrain the assessment or collection of a tax?

Statutes Involved

The Federal Statutes involved are:

48 U.S.C. Sec. 872

The Supreme and district courts of Puerto Rico and the respective judges thereof may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the district courts of the United States, and the district courts may grant writs of mandamus in all proper cases.

No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico. Mar. 2, 1917, c. 145, Sec. 48, 39 Stat. 967; Mar. 4, 1927, c. 503, Sec. 7, 44 Stat. 1421; May 17, 1932, c. 190, 47 Stat. 158.

28 U.S.C. Sec. 1341

The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. June 25, 1948, c. 646, 62 Stat. 932.

48 U.S.C. Sec. 741(a)

The internal-revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this chapter on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island: Provided, that no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico. The officials of the Customs and Postal Services of the United States are directed to assist the appropriate officials of the Puerto Rican government in the collection of these taxes. Mar. 2, 1917, c. 145, Sec. 3, as added Mar. 4, 1927, c. 503, Sec. 1, 44 Stat. 1418, and amended May 17, 1932, c. 190, 47 Stat. 158; Aug. 26, 1937, c. 831, 50 Stat. 843.

United States Constitution

Article 1, Sec. 8

"The Congress shall have power . . . To regulate Commerce with foreign nations, among the several States, and with the Indian Tribes;"

Article IV, Sec. 3, Clause 2

The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claim of the United States, or of any particular State.

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

This is an action for declaratory and injunctive relief, brought by five United States mainland beer producers and a trade association representing the producers of 95 percent of the beer sold in the country, to invalidate and restrain the grant of a tax exemption to locally produced beer, which exemption is denied to beer imported from the other states or foreign countries. Act 37 of July 13, 1978, Appendix F, exempts from an additional internal revenue tax "beer produced by persons whose total production during its most recent year has not exceeded thirty-one million (31,000,000) wine gallons". In their Amended Complaint, Appendix G, petitioners alleged the law was intended to and does *de facto* protect, via the exemption mechanism, beer produced in Puerto Rico, in open violation of the Act of Congress, 48 U.S.C. Sec. 741(a) which specifically prohibits Puerto Rico from using its taxing power to discriminate "between articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico". It was also alleged that the exemption of Act 37 infringed Article I, Section 8; Article IV, Section 3, Clause 2; Article VI, Clause 2 and the Fifth and Fourteenth Amendments to the United States Constitution, and also Sections 737 and 741(a) of the Federal Relations Act, 48 U.S.C. Sec. 737 and 741(a).

While describing Act 37 as *prima facie* in violation of 48 U.S.C. Sec. 741(a), the district court denied relief, holding instead that the Butler Act, 48 U.S.C. Sec. 872, construed akin to 28 U.S.C. Sec. 1341, precluded injunctive relief if a plain, speedy and efficient remedy existed in the local forum to challenge the legality of the tax. Uncertain about the availability and adequacy of local remedies, the district court denied defendants' motion to dismiss but directed plaintiffs to seek a decision of the Puerto Rican Courts as to all issues raised in this case. Appendix A. A Petition for Rehearing and Reconsideration of this ruling was likewise denied. Appendix B. At this point, plaintiffs appealed the denial of injunctive relief, Appendix H. They also complied with the directive of the District Court by seeking relief under Puerto Rican law in the local court. Although petitioners expressly reserved federal claims for adjudication by the federal forum according to the doctrine of *England* v. *La. St. Bd. of Med. Examiners,* 375 U.S. 411 (1964); the Superior Court of Puerto Rico on December 12, 1978, denied relief and ruled Act 37 constitutional on the grounds that the Twenty-First Amendment to the Constitution of the United States had repealed 48 U.S.C. sec. 741(a) with respect to alcoholic beverages and did not violate the due process and equal protection clauses of the Puerto Rican constitution. (Appendix D, p. 79, Opinion & Judgment). The decision of the Superior Court is presently on appeal before the Supreme Court of Puerto Rico.

On February 21, 1979, the United States Court of Appeals for the First Circuit affirmed the decision of the District Court holding "it might well be proper to apply the Butler Act beyond its literal terms to encompass their suit to enjoining the enforcement of tax exemption". (Appendix E, pp. 86-87). The Court of Appeals based its decision "on the considerations which underlie 28 U.S.C.

Sec. 1341 and the Butler Act, that is, equity practice, . . . principles of federalism . . . and the imperative need of a state to administer its own fiscal operations. Furthermore, in view of the decision rendered by the Superior Court of Puerto Rico, the case was remanded to the district court with directions to dismiss for want of jurisdiction because in its opinion, there no longer existed any uncertainty about the willingness of those courts (Puerto Rican) to address the merits of the claim."

The availability of a procedure in the state forum is not in controversy; the sole issue presented to the Court of Appeals was the applicability of the Butler Act to deprive the federal court of jurisdiction under the circumstances of this case.

Reasons for Granting the Writ

THE COURT OF APPEALS HAS CONSTRUED THE SCOPE OF THE ANTI-INJUNCTION STATUTE CONTRARY TO THE PLAIN WORDS OF THE ACT, IN CONFLICT WITH OTHER DECISIONS OF FEDERAL COURTS CONSTRUING SIMILAR STATUTES AND AT VARIANCE WITH DECISIONS OF THIS COURT UPHOLDING FEDERAL INTERVENTION WHERE A TAX EXEMPTION IS, OR MIGHT INFRINGE, FEDERALLY PROTECTED RIGHTS.

This is an action to challenge a tax exemption allegedly infringing various constitutional provisions and the proviso of the Federal Relations Act, 48 U.S.C. Sec. 741(a), prohibiting Puerto Rico from discriminating by way of its taxing power between articles imported from the United States and other foreign countries and similar articles manufactured in Puerto Rico.

The District Court found the challenged exemption to be *prima facie* a violation of Section 741(a) but denied declaratory and injunctive relief on the grounds that the

Butler Act, 48 U.S.C. Sec. 872, construed akin to 28 U.S.C. Sec. 1341, barred such relief unless a plain, speedy and efficient remedy be found not to exist in the state court.

On appeal, it was argued that the action challenging the tax exemption, unlike that challenging the enforcement levy and collection of a tax, is barred neither by the Butler Act, nor 28 U.S.C. Sec. 1341, since the reason which prompted the passage of these statutes, protecting the revenue gathering function of a state and the fiscal solvency thereof, would not be affected. Thus, the failure to distinguish between restraining enforcement and collection of a tax and restraining an exemption therefrom was claimed to have been error.

Contrary to decisions of other federal courts holding section 1341 inapplicable to actions which did not seek to restrain the collection of a tax; *Garret* v. *Bamford,* 538 F.2d 63, 72-73 (3 Cir. 1976); *Hargrave* v. *McKinney,* 413 F.2d 320, 326 (5 Cir. 1969); *Levy* v. *Parker,* 346 F. Supp. 897, 904 (E.D. La. 1972), affirmed 411 U.S. 978 (1973); *Baker* v. *Stone,* 348 F. Supp. 1257 (W.D. Ky. 1971); *Kerr* v. *Enoch Pratt Free Library,* 54 F. Supp. 514, 525 and 527 (D. Md. 1944), reversed on other grounds, 149 F.2d 212 (4th Cir. 1945), cert. denied, 326 U.S. 721, the Court of Appeals construed the literal terms of the anti-injunction statute to encompass this action. In so doing, it has so drastically departed from the mainstream of federal judicial precedent as to warrant review by this Court.

The abdication of judicial power herein in the presence of apparent, or as described by the district court "*prima facie*", violation of a federal statute prohibiting use of taxing power to discriminate, is also in conflict with decision of this court and other federal courts which have entertained similar suits where the tax exemption under attack served to foster inequality, discrimination or infringed upon the Establishment Clause. *Griffin* v. *County*

Sch. Bd. of Prince Edward Co., 377 U.S. 218, 233 (1964); *Committee for Public Ed. & Religious Lib.* v. *Nyquist,* 413 U.S. 756, 789-794 (1973); *Public Funds for Public Schools of New Jersey* v. *Byrne,* January 12, 1979, 47 L.W. 2473-2474 (3 Cir.); *Jackson* v. *Statler Foundation,* 496 F.2d 623, 626 (2 Cir. 1973); *Cornelius* v. *Benevolent Protective Order of Elks,* 382 F. Supp. 1182, 1191-1194 (D. Conn. 1974); *Kosydar* v. *Wolman,* 335 F. Supp. 774, 755-757 (S.D. Ohio, E.D. 1972); *Falkstein* v. *Department of Revenue, State of Oregon,* 350 F. Supp. 887, 888 (D. Oregon 1972), stay denied, 409 U.S. 1032, appeal dismissed, 409 U.S. 1099; *Pitts* v. *Department of Revenue for State of Wisconsin,* 333 F. Supp. 662, 669-670 (E.D. Wisc. 1971); *Green* v. *Conally,* 330 F. Supp. 1150 (D.C. 1971). In affirming the lower court's abdication of jurisdiction to vindicate the federal right claimed, the Court of Appeals has unduly expanded the intended scope of the anti-injunction statutes. 68 Cong. Record p. 5025, (Butler Act, 48 U.S.C. Sec. 872); H.R. Rep. No. 1503, 75th Cong. 1st Sess. 2 (1937); Sen Rep. No. 1035, 75th Cong. 1st Sess. 1-2 (1937); 81 Cong. Record 1415-1416. Such broad, all encompassing interpretation of the statute further clashes with the interpretation of the analogous provision of the Declaratory Judgment Act, 28 U.S.C. Sec. 2201, and the Tax Injunction Act, 26 U.S.C. Sec. 7421(a); *McGlotten* v. *Connally,* 338 F. Supp. 448, 452-454 (D.C. 1972).

The rationale of the Court of Appeals: equity practice, . . . principles of federalism . . . and the imperative need of of a state to administer is own fiscal operations", which is the basis for its conclusion, is, likewise, irreconcilable with decisions sanctioning exercise of federal equity and declaratory power to restrain an unconstitutional or illegal tax exemption. The cases of *Mathew* v. *Rogers, Great Lake* v. *Huffman,* 319 U.S. 293, 299 (1943); *Tully* v. *Griffin,* 429 U.S. 68, 73 (1976) or *Paul Smith Construction* v. *Bus-*

caglia, 140 F.2d 900, 901-02 (1 Cir. 1944); cited by the Court of Appeals as supporting its conclusion, involved injunctive or declaratory relief to restrain collection of a state tax and the precise issue before the Courts was the availability of a state remedy to recover payment of the illegal tax. Neither of those cases, however, involved a challenge of a discriminatory tax exemption. Consequently, those decisions do not afford a basis for expanding the scope of the anti-injunction statute far beyond its plain terms or intent.

The distinction advanced as basis for construing the statute beyond its literal terms erodes federal judicial power to vindicate federally protected rights and if allowed to stand will undoubtedly provide an escape from federal scrutiny to illegal and unconstitutional tax-exemptions. Congress explicitly defined the cases in which federal intervention would be precluded. Only where enforcement, assessment, levy and collection of a state tax is sought to be restrained, as evidenced by the precise language employed, will jurisdiction be curtailed. Such explicit limitation, however, ought not, absent evidence of Congressional intent, be expanded by judicial fiat merely because federal scrutiny might interfere with the state's domestic policy. Such encroachment of the federal judicial power to vindicate rights guaranteed by the constitution and federal laws must be narrowly construed. *Hargrave* v. *McKinney, supra,* at p. 326.

The Court of Appeals' reluctance to interfere on the basis that "the invalidation of the exemption in Act 37 is an awkward and heavy handed remedy, producing a broad taxing statute for which the Commonwealth may have believed there was no need or which was actually detrimental to its domestic policy", (Appendix E, p. 87) is also at variance with this Court's approval of judicial interference to scrutinize tax benefits, deductions or exemptions which further an unconstitutional or illegal objective. The tax benefits invalidated in *Committee for Public Ed. & Religious Lib.* v. *Nyquist, supra,* like the tax exemption upheld in *Walz* v. *Tax Comm'n.*, 397 U.S. 664 (1970), were part of a broad, comprehensive tax and social state policy; yet, this Court found no impediment to the exercise of judicial power even though it clearly interfered with that policy. Furthermore, interference in these cases was not foreclosed by the anti-injunction statute in spite of the availability of a state forum to vindicate the federal claims. Although in these cases, this Court was not specifically called upon to rule on the applicability of the anti-injunction statute, it is reasonable to conclude that interference would not have been approved had the statute applied. The anti-injunction statute and the principle underlying same has been applied only to declaratory or injunctive relief to prevent enforcement, levy and collection of a state tax, *Tully* v. *Griffin,* 429 U.S. 68; *Great Lakes* v. *Huffman, supra*; *Mathews* v. *Rogers, supra,* but beyond that limited application, this case appears to be the first instance where it has been applied to bar relief against an invalid exemption.

Lower federal courts have specifically held the statute inapplicable to actions like the present one. *Garret* v. *Bamford, supra*; *Hargrave* v. *McKinney, supra*; *Levy* v. *Parker, supra*; *Baker* v. *Stone, supra,* and *Kerr* v. *Enoch Pratt Free Library, supra.* In *Cornelius* v. *Benevolent Protective Order of Elks,* 382 F. Supp. 1182, *supra,* at p. 1191, injunctive relief was withheld but only because the current exemption claim had become moot when the affected societies amended their constitution to eliminate discrimination. The Court, however, pointed out that if *de facto* discrimination were shown to subsist relief would have been appropriate. 382 F. Supp. at 1192. The attempt by the Court of Appeals to buttress its conclusion by reference to the

language of the Court in *Cornelius*, at pages 1193-1194, relative to relief seeking to compel collection of back taxes must fail because in this action petitioners only sought to enjoin the granting of an illegal exemption, not the collection of back taxes.

Construction of the anti-injunction statute to encompass the relief sought in this case is error. It is submitted that the District Court had jurisdiction to invalidate and restrain enforcement of the exemption provided by Act 37, as such action would not have interfered with protected state fiscal activity. If there is any doubt on this question, this Honorable Court should now settle this doubt.

Conclusion

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

In the United States District Court
For the District of Puerto Rico

Civil Number: 78-1370

United States Brewers Association, Inc., et al.,
plaintiffs,
v.
Julio Cesar Perez, et al.,
defendants.

OPINION AND ORDER

This is an action for injunctive and declaratory relief filed by five corporations engaged in the business of manufacturing beer for distribution and sale in interstate and foreign commerce, and by a trade association which allegedly represents the manufacturers of ninety five percent of the beer sold in the United States. The Defendants are the Secretary and the Director of the Bureau of Alcoholic Beverages of the Treasury Department of the Commonwealth of Puerto Rico.

Plaintiffs challenge the validity of Act 37 of July 13, 1978, enacted by the Legislative Assembly of the Commonwealth of Puerto Rico. Succinctly stated, this statute increases the internal revenue tax on beer produced by breweries whose annual production exceeds 31 million gallons, from $1.05 up to $1.60 per wine gallon or fraction of wine gallon; and establishes a procedure to exempt from that tax increase the beer ". . . produced or manufactured by persons whose total production . . . during its most recent tax year has not exceeded thirty one million (31,000,000) wine gallons . . ."

Plaintiffs allege that the evident intent and necessary effect of Act 37 is to discriminate in favor of the two local

breweries by establishing a classification that subjects the Plaintiffs to the higher tax, while the only breweries which would qualify for the exemption are the local ones. It is Plaintiffs' contention that the statute in question is violative of Art. I, Section 8; Art. IV, Section 3, Clause 2; Art. VI, Clause 2 and the Fifth and Fourteenth Amendments to the United States Constitution. It is further alleged that the statute transgresses the Federal Relations Act, particularly 48 U.S.C. 737 and 741(a), in that it discriminates between articles imported from the United States or foreign countries and similar articles manufactured in Puerto Rico.

The controlling threshold question in this case is jurisdictional. The Butler Act, 48 U.S.C. 872 reads as follows:

> "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico.

There are no recent court decisions interpreting the scope of this Act.[1] Read without qualification, it deprives this Court of power to entertain any action wherein it is sought, either directly or indirectly, to restrain the collection of a tax imposed under the Law of Puerto Rico, including suits for declaratory judgments. *Sancho* v. *National City Bank of N. Y.*, 112 F. 2d. 998 (C.A. 1, 1940); *Paul Smith* v. *Buscaglia*, 140 F. 2d 900 (C.A. 1, 1944).

However, we do not read the Butler Act as an unqualified and blanket prohibition against equitable relief operative even in the presence of extraordinary and exigent circumstances.

The Court of Appeals for the First Circuit has clearly refused to foreclose the possibility that the Act may be

[1] The latest case in point is *Everlasting Development Corp.* v. *Sol Luis Descartes*, 95 F. Supp. 954 (D.C.P.R. 1951), aff'd. 192 F. 2d 1 (C.A. 1, 1951), cert. den. 342 U.S. 954 (1952).

subject to exceptions in certain cases. In *Sancho* v. *National City Bank of N. Y.*, supra, the Appellate Court stated that "the Butler Act means what it says." *Id.*, at p. 1003. However, the Court went on to intimate that there may be exceptions to the prohibition where "the taxpayer is put to the direct necessity, and can make out a case of gross and indisputable oppression, without adequate remedy at law." Ibid. After examining the remedies available to the taxpayer in the Puerto Rico forums, the Court of Appeals concluded that no such "special and extraordinary circumstance[s]" were present as would justify the issuance of an injunction. Id. at p. 1004.

In a case that was decided four years after *Sancho*, the Court followed the same cautious path. *Paul Smith* v. *Buscaglia*, supra, although indicative of a refusal to definitely settle the issue, again admitted the plausibility of exceptions "in special and extraordinary circumstances" and reiterated that the absence of an adequate remedy at law may justify the exercise of the court's remedial power. Id., at pp. 901-902.

This clearly flexible approach to the language of 48 U.S.C. 872 has been embraced by this Court. In *Boyce* v. *Buscaglia*, 77 F. Supp. 753 (D.C.P.R., 1948), the Court discussed the portent of the Butler Act within the context of an action brought by certain trustees of an express trust, praying for instructions as to their duty to their beneficiaries concerning certain income tax withholdings from dividends. Given the *sui generis* nature of the relief requested, the Court deemed it unnecessary to decide whether or not the Butler Act should be strictly construed. Nevertheless, the Court stated:

> "This court is not prepared to hold that the Butler Act was intended to prevent this court from taking jurisdiction of a case such as this provided it is clearly shown that there is otherwise no adequate remedy.

> The Constitutional Federal Courts, even before the existence of any statutory provisions, normally refused to enjoin the collection of taxes so as to avoid hampering the State governments, but often made an exception in cases where there was no adequate remedy at law . . . *It is doubtful whether the Butler Act intended to do more than to state the general principle and whether it was intended to prevent suits when there is no plain, speedy and efficient remedy* . . . One can readily imagine cases where there would be no remedy whatsoever in the Insular courts, *in which case the question might arise as to whether the Butler Act itself were constitutional* as prohibiting any action whatsoever to contest the validity of a tax." 77 F. Supp. at 756-757 (Emphasis added).

In the latest decision dealing with the instant subject: *Everlasting Development Corp.* v. *Sol Luis Descartes*, supra, the District Court was faced with a request for dismissal of an action seeking a declaratory judgment as to the right of the plaintiffs to tax exemption under a local statate. The court commenced its analysis from the premise that the declaratory suit's object was to avoid payment of taxes which had been or would be imposed as a result of Plaintiff's petition for tax exemption having been denied by Defendants, and that therefore the action was within the ban of the Butler Act.

After analogyzing 48 U.S.C. 872 with the similar provision contained in 28 U.S.C. 1341, the court expressed:

> "It might well be then, that if the plaintiffs here, as they allege, are without 'any remedy whatsoever in the Insular Courts of Puerto Rico', the instant case would come within the meaning of the term 'special and extraordinary circumstances' used by the Court of Appeals in the Paul Smith case, supra. If that were so, this court by virtue of reading such an implied exception into the Butler Act, could acquire jurisdiction . . ." 95 F. Supp. at 958.

Upon making such an important pronouncement, the court engaged in the same quest which had been invariably undertaken in all of the previous cases on the subject, i.e., whether the Plaintiffs had resort to adequate local remedies.[2]

In our opinion, the foregoing clearly evinces a judicial tendency to treat the Butler Act in a manner consistent with general equitable principles. However, the instant case presents certain additional factors which merit exploration before attempting to frame a definite construction of the statute.

Section 3 of the Organic Act, as amended, 44 Stat. 1418 (1927), 48 U.S.C. 741(a), limits the taxing authority of the Legislature of Puerto Rico by expressly prohibiting discrimination between articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico. This clear-cut congressional enactment has been given full validity in several decisions. See, e.g., *San Juan Trading Co.* v. *Sancho*, 114 F. 2d 969 (C.A. 1, 1940), cert. den. 312 U.S. 702; *Sancho* v. *Corona Brewing Corp.*, 89 F. 2d 479 (C.A. 1, 1937), cert. den. 302 U.S. 699. However, courts have never been called upon to resolve the conflict that exists between this prohibition and the Butler Act, because the Butler Act has never been analyzed in situations like the instant one, where the taxing statute complained of *prima facie* falls under the ban of 48 U.S.C. 741(a).

In *Sancho* v. *Corona Brewing Corp.*, supra, a tax exemption favoring local products was declared void because it was in clear violation of Section 3 of the Organic Act. However, unlike *Everlasting Development Corp.* v. *Sol*

[2] The action was dismissed upon the court's determination that such remedies were indeed available.

Luis Descartes, supra, the declaration of invalidity of the tax exemption in *Corona* did not have the effect of restraining the assessment or collection of any tax.[3] Furthermore, in the "matches case", *San Juan Trading Co.* v. *Sancho*, supra, what was involved was an action to recover amounts *already paid* under protest. Hence, the purpose behind the approval of the Butler Act, which was to apply the same rule in Puerto Rico that applied in the United States, i.e., "to pay the tax first and then take an appeal",[4] was not transgressed.[5]

The importance of the prohibition against tax discrimination set forth in Section 3 of the Organic Act cannot be overlooked.[6] In our opinion, this provision ought to be harmonized with the Butler Act. In consonance with the decisions outlined above, we hold that the Butler Act cannot preclude the enjoinment of a Commonwealth's tax where a clear violation of 48 U.S.C. 741(a) is established, and where there exists no plain, speedy and efficient remedy in the local forums. To rule otherwise would in effect portend that this Court is without power to construe, apply or give effect to the clear Congressional policy envisaged in Section 3 of the Organic Act,[7] and would render the same virtually inoperative. We are not willing to attribute such an event to the draftsmen of these statutes.

As has been intimated in previous decisions,[8] we must

[3] It is interesting to note that the Court in *Corona* stated that the 21st Amendment to the Constitution did not authorize transgression of 48 U.S.C. 741(a); 89 F. 2d at p. 481.

[4] 68 Cong. Rec., p. 5025, quoted in *Sancho* v. *Nat. City Bank of N.Y.*, supra, at p. 999.

[5] This Congressional intent clearly tends to restrict the thrust of the Butler Act's prohibition. That rationale behind the Act is inapposite to the case at bar, where the taxpayers are not parties to the action.

[6] 48 U.S.C. 741(a) is still in full force by virtue of Art. IX, Section 1 of the Constitution of the Commonwealth of Puerto Rico.

[7] See, *San Juan Trading Co.* v. *Sancho*, supra, at pp. 973-974.

[8] See, *Everlasting Development Corp.* v. *Sol Luis Descartes*, supra; *Boyce* v. *Buscaglia*, supra.

also look to the general anti-injunction provision of 28 U.S.C. 1341 as delineating the scope of our authority under the Butler Act. The cited statute reads:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law *where a plain, speedy an efficient remedy may be had in the courts of such State.*" (Emphasis added).

It is true that the Butler Act is specifically addressed to the authority of the United States District Court for the District of Puerto Rico. It is also apparent that, read literally, the Butler Act is not on its face subject to the equitable exception established in 28 U.S.C. 1341. However, we opine that both provisions must be given the same substantive construction or this Court would otherwise be placed in an anomalous and anachronic situation within the federal court system.

Even at a time when this Court was undoubtedly regarded as a statutory court, doubts were cast on whether the Butler Act was intended to prevent suits even beyond the qualifications inherent in 28 U.S.C. 1341. See *Boyce* v. *Buscaglia*, supra, at 756-757; *Everlasting Development Corp.* v. *Sol Luis Descartes*, supra, at 956-958. Such doubts are even stronger at a time when the statutory character of this Court has been laid to rest. See, *Miranda* v. *United States*, 255 F. 2d 9, 14-15 (C.A. 1, 1958); *United States* v. *Ramos Colon*, 415 F. Supp. 459, 465 n. 11 (D.C.P.R., 1976). Considering that this Court is now a constitutional district court pursuant to Article III, Section 2 of the Constitution, Ibid.,[9] we express serious reservations as to the va-

[9] Article III, Section 2, Clause 1 of the Constitution states in its pertinent part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . ."

lidity of an independent strict construction of the Butler Act.

But we need not reach said conclusion in this case, insofar as the cases discussed hereinbefore provide us with reliable authority to conclude that both sections are not dissimilar in their scope. They do not prevent remedial action in the absence of a "plain, speedy and efficient remedy" in the Courts of the Commonwealth of Puerto Rico.

Our inquiry thus returns to whether Plaintiffs here have resort to such an alternative avenue for relief.

Pursuant to 13 L.P.R.A. 282, 4060, a taxpayer is entitled to seek a refund of a tax paid under protest upon following a specified procedure. Since Plaintiffs herein are not taxpayers, they concededly cannot benefit from the refund procedure. In determining whether there exists an adequate remedy for injunctive relief in the Courts of Puerto Rico, it is necessary to refer to Section 678 of the Puerto Rico Code of Civil Procedure, which provides in its pertinent part:

> "An injunction or restraining order cannot be granted . . . [t]o prevent the levying or collection of any tax levied by the laws of the United States or of Puerto Rico." 32 L.P.R.A. 3524(7).

This prohibition is absolute on its face. However, the highest Court of the Commonwealth of Puerto Rico has recognized that an injunction may lie where it is alleged that a tax is illegal and when it appears that the Petitioner is without an adequate remedy at law or that he would be subject to irreparable injury. See, *Cafeteros de P. R.* v. *Treasurer*, 74 P.R.R. 704, 715 (1953); *Cooperativa Cosecheros de Cafe* v. *Treasurer*, 69 P.R.R. 210, 214 (1948); *Fernandez* v. *Buscaglia*, 60 P.R.R. 582 (1942).

Although 32 L.P.R.A. 3524(7) has been interpreted in light of unnversal principles of equity, we know of no case

where the implementation of a taxing statute has been held to fall within the exception. Moreover, the Supreme Court itself has stated that even in cases where the Petitioner is not a taxpayer entitled to resort to the refund procedure, strong considerations of public policy may counsel against the exercise of extraordinary equity powers. *Cafeteros de P. R.* v. *Treasurer*, supra, at pp. 715-717. The same criteria are controlling in actions where the declaratory judgment device is invoked to challenge the validity of a tax. See, *Larroca* v. *Aboy*, 82 P.R.R. 478, 484 (1961); *Cooperativa Cosecheros de Cafe* v. *Treasurer*, supra, at p. 214.[10]

On August 8, 1974, the Legislature of Puerto Rico added the following language to Section 3524:

> "An injunction or restraining order cannot be granted:
>
> 1. . . .
> 2. . . .
> 3. To restrain the application or enforcement of any statute of the Legislative of Puerto Rico, or the performance by a public officer, a public corporation, or a public agency, or by any employee or officer of such corporation or agency of any act authorized by law of the Legislature of Puerto Rico, unless it has been determined by final, firm, unappealable, and unreviewable judgment that such statute or act authorized by law is unconstitutional or invalid.
>
> . . . .

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[10] The United States Supreme Court has recently determined that in actions where the State's assessment of taxes is challenged on constitutional grounds, 28 U.S.C. 1341 requires dismissal if a declaratory judgment action to challenge the imposition of the tax is available in the Courts of the State. *Tully* v. *Griffin*, 429 U.S. 68, 74-75 (1976).

"Provided, however, that the court may issue said temporary restraining order, preliminary or permanent injunction . . . :

(1) . . .

(2) When in the petition it is pleaded that any person, under the authority of any law, ordinance or regulation of the Commonwealth of Puerto Rico, is depriving or is causing someone else to deprive the petitioner of any right, privilege or immunity protected by the Constitution or laws of the Commonwealth of Puerto Rico or by the Constitution or the laws of the United States of America applicable to persons under jurisdiction of the Commonwealth of Puerto Rico."

It is discernible that this amendment enlarges the power of the Commonwealth Courts to issue injunctions in appropriate cases. However, the Supreme Court of Puerto Rico has not been called upon to construe the amendment against the still effective ban of 32 L.P.R.A. 3254(7).

In view of the foregoing, and considering the nature of the injuries alleged in this case, we cannot definitely ascertain whether the Law of Puerto Rico provides the "plain, speedy and efficient" remedy that would deprive this Court of power to entertain the present action. This uncertainty as to the availability and adequacy of a local remedy is sufficient to preclude the dismissal of the instant action. *Garrett* v. *Barnford*, 538 F. 2d 63 (C.A. 3, 1976), cert. den. 429 U.S. 977; *Sterling Shoe Co.* v. *Norberg*, 411 F. Supp. 128 (D.C.R.I., 1976). We therefore deny Defendants' request for dismissal. However, in view of the doubts presented by the Law of Puerto Rico and considering the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law", *Rizzo* v. *Goode*, 423 U.S. 362, 378 (1976),

we will hold our equitable hand at the present instance while Plaintiffs seek, as they are hereby directed to do *forthwith*, a decision from the Commonwealth Courts as to the issues raised in this case, and particularly, concerning the existence of an adequate right of action. Cf. *Diaz Gonzalez* v. *Colon Gonzalez*, 536 F.2d 453 (C.A. 1, 1976).[11]

This Court will nevertheless retain jurisdiction over this suit pending consideration by the Commonwealth Courts of the validity and availability of the remedies which Defendants allege are extant. One of the considerations that shall guide us in deciding any future action by this Court will be the speed with which the Commonwealth Courts act upon submission of the controversy.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 7th day of August, 1978.

(s) JUAN R. TORRUELLA
JUAN R. TORRUELLA
U.S. District Court Judge

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[11] Considering our present holding, Plaintiffs request for extension of the Temporary Restraining Order issued on July 19, 1978 must also be DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Number: 78-1370

UNITED STATES BREWERS ASSOCIATION, INC., et al.,
PLAINTIFFS,
v.
JULIO CESAR PEREZ, et al.,
DEFENDANTS.

ORDER

Plaintiffs' "Motion for Rehearing and Reconsideration of Opinion and Order", filed on August 11, 1978 is hereby DENIED without prejudice. See, Opinion and Order of August 7, 1978, at pp. 10-11; see also: *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 551 F. 2d 1093 (C.A. 7, 1977); *King* v. *Sloane*, 545 F. 2d 7 (C.A. 6, 1976).

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 17th day of August, 1978.

(s) JUAN R. TORRUELLA
JUAN R. TORRUELLA
U.S. District Court Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Number: 78-1370

UNITED STATES BREWERS ASSOCIATION, INC.,
ANHEUSER-BUSCH, INC.,
CARLING NATIONAL BREWERIES, INC.,
MILLER'S BREWING CO.,
JOS. SCHLITZ BREWING CO.,
THE F. & M. SCHAEFER BREWING CO., INC.,
PLAINTIFFS,
v.
JULIO CESAR PEREZ, as Secretary of the Department of the Treasury of the Commonwealth of Puerto Rico; and LUIS DEYNES FEIJOO, as Director of the Bureau of Alcoholic Beverages of the Treasury Department of the Commonwealth of Puerto Rico,
DEFENDANTS.

NOTICE OF APPEAL AND DEPOSIT OF SECURITY

NOTICE is hereby given that plaintiffs appeal to the United States Court of Appeals for the First Circuit from the Opinion and Order filed and entered on August 7, 1978 and the Order filed and entered on August 18, 1978.

Pursuant to Rule 7 of the Federal Rules of Appellate Procedure, the plaintiffs above named, herewith deposit with the Clerk of the United States District Court for the District of Puerto Rico a check in the sum of Two Hundred Fifty-Five Dollars ($255.00) as security for costs on appeal to the United States Circuit Court of Appeals for the First Circuit from the above-referred judgment and order entered in the above entitled and numbered action.

The condition of this deposit is that such security shall be returned to plaintiffs above named, if said plaintiffs shall answer for the costs if the appeal is finally dismissed or the judgment and/or order are affirmed, or for such costs as the Court of Appeals may direct if the judgment and/or order are modified.

I CERTIFY that copy of the preceding Notice of Appeal and Deposit of Security has been sent, on this date, by messenger, to Vivian Reyes de Rodriguez, Esq., Department of Justice of the Commonwealth of Puerto Rico, Old San Juan, Puerto Rico 00902.

Carolina, Puerto Rico, September 1, 1978.

(s) FEDERICO A. CORDERO

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APPENDIX D

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN SECTION

Civil #PE-78-1137
FOR:
INJUNCTION AND
DECLARATORY JUDGMENT

UNITED STATES BREWERS ASSOCIATION, INC., ET ALS (sic)
PLAINTIFFS,
v.
JULIO CESAR PEREZ,
SECRETARY OF THE TREASURY, ET ALS (sic),
DEFENDANTS.

OPINION AND JUDGMENT

STATEMENT OF THE CASE

On July 18, 1978 the petitioners, U.S. Brewers Association, Inc. and the brewers, Anheuser-Busch, Inc., Carling National Breweries, Inc., Miller's Brewing Co., Jos. Schlitz Brewing Co. and The F. & M. Schaefer Brewing Co., Inc., filed a petition for injunction and declaratory judgment before the Federal Court for the District of Puerto Rico. They attacked the constitutionality of Act No. 37 of July 13, 1978 that amends the Alcoholic Beverages Act of Puerto Rico by increasing from one dollar five cents to one dollar sixty cents the excise tax on beer.[1] They alleged that under

[1] The cited act provides, with respect to what we consider relevant to the matters before us, the following:

"Article 1. Subsections (b) and (c) of Section 4 of Article 6 are amended and Article 21-A is added to Law No. 143 promulgated on June 30, 1969, as amended so as to read as follows:

color of authority they were being deprived of rights protected by the Fifth and Fourteenth Amendments to the Constitution of the United States.

"Article 6.—

There shall be imposed, collected and paid once on the following products that are held in deposit or that have been or may be in the future distilled, rectified, produced, manufactured, imported or introduced into Puerto Rico, an internal revenue tax at the following rates:

1. (a) . . . . . .

4. (a) . . . . . .

(b) On all beer, lager beer, ale, porter, malt extract and other analogous fermented or non-fermented products, whose alcoholic content exceeds one and one half percent (1½%) by volume, there shall be collected a tax of one dollar sixty cents ($1.60) for each wine gallon and a proportional tax at the same rate on each fraction of wine gallon, except as provided in Article 21-A of this law.

(c) On all beer, lager beer, ale, porter, malt extract and other analogous fermented or non-fermented products whose alcoholic content exceeds one and one-half percent (1½%) by volume and is sold in containers of five (5) or more wine gallons, there shall be collected a tax of one dollar sixty cents ($1.60) for each wine gallon and a proportional tax at the same rate on each fraction of wine gallon, except as provided in Article 21-A of this law.

Article 21-A—Special Exemption.

Instead of the tax provided by subsections (b) and (c) of Section 4 of Article 6 of this law on all beer, lager beer, ale, porter, malt extract and other analogous fermented and non-fermented products whose alcoholic content exceeds one and one-half (1½) percent by volume to which subsections (b) and (c) of said Article refer, that are produced or manufactured by persons whose total production, if any, of said products during the most recent taxable year has not exceeded thirty-one million (31,000,000) wine gallons, there shall be collected a tax of one dollar five cents ($1.05) per wine gallon and a proportional tax at the same rate on each fraction of wine gallon. Subject to the provisions of paragraphs (A) to (E), the benefits of this Article shall be granted for any taxable year of a person following that year in which his total production of the products described in this Article, if any, have not exceeded thirty-one million (31,000,000) wine gallons."

They also claimed rights under section 8 of article 1, clause 2 of section 3 of article IV and clause 2 of Article VI of the Northamerican Constitution, and the Civil Rights Act (48 U.S.C. §1983). They alleged, as well, that Act No. 37 violates the Federal Relations Act and particularly sections 737 and 741(a) of Title 48 of the United States Code.

In an opinion signed by the Honorable Juan R. Torruella, the Court believed, after harmonizing the jurisdictional prohibition of the Butler Act (48 U.S.C. 872)[2] with the provisions of section 1341 of Title 28 of the United States Code,[3] that the prohibition imposed by section 7 of article 678 of the Code of Civil Procedure (32 L.P.R.A. 3524),[4] should be interpreted in the light of Act No. 12 of August 8, 1974, (32 L.P.R.A. 3524).[5] In view of the uncer-

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[2] This Act provides:

"No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico."

Although it provides a remedy against injunctions to prevent the imposition and collection of taxes, its ambit has been judicially varied, it being established that the Federal Court may grant an injunction for such purposes in special and extraordinary circumstances. See: *Sancho* v. *National City Bank of New York*, 112 F.2d 998 (1940); *Paul Smith* v. *Buscaglia*, 140 F.2d 900 (1944); *Boyce* v. *Buscaglia*, 77 F. Supp. 753 (1948).

[3] It prohibits the issuance of an injunction to restrain the imposition or collection of a tax when "a plain, speedy and efficient remedy may be had in the court of such State."

[4] It establishes that no injunction or restraining order may be issued "[t]o prevent the levying or collection of any tax levied by the laws of the United States or of Puerto Rico."

[5] Said law provides in pertinent part:

"An injunction or restraining order cannot be granted:

1. .....

2. .....

3. To restrain the application or enforcement or any statute of The Legislature Of Puerto Rico, or the performance by a public officer, a public corporation, or a public agency, or by any employee or officer of such corporation or agency of any act authorized by a law of the Legislature of Puerto Rico,

tainty and doubt that the laws of Puerto Rico can provide an effective and rapid remedy, plaintiffs were ordered

> "[T]o seek, as they are hereby directed to do *forthwith*, a decision from the Commonwealth Courts as to the issues raised in this case, and particularly, concerning the existence of an adequate right of action."

On the basis of this determination, and in search of a forum that grants a just, speedy and economical remedy, on August 3, 1978 the petitioners filed before this Court an application for injunction and declaratory judgment. They request that a provisional injunction, preliminary and permanent, be issued against Julio Cesar Perez, Secretary of the Treasury, and Luis Deynes Feijoo, Director of the Alcoholic Beverages Bureau of the Department of the Treasury, in order that they refrain from levying and collecting the tax established by Act No. 37. They also attack, by means of a declaratory judgment, the constitutionality of said act.

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unless it has been determined by final, firm, unappealable, and unreviewable judgment that such statute or act authorized by law is unconstitutional or invalid.

Any injunction, preliminary, permanent, or of the nature of a restraining order, including any order to enforce the jurisdiction of a court or to secure the enforcement of any judgment, issued under the circumstances set forth in this clause 3 and in force on the date this act takes effect, or which may hereafter be issued, shall be null and ineffective.

Provided, however, that the court may issue said temporary restraining order, preliminary or permanent injunction subject to the terms of Rule 57 of Civil Procedure.

(1) .....

(2) When in the petition it is pleaded that any person, under the authority of any law, ordinance or regulation of the Commonwealth of Puerto Rico, is depriving or is causing someone else to deprive the petitioner of any right, privilege, or immunity protected by the Constitution or the laws of the Commonwealth of Puerto Rico or by the Constitution or the laws of the United State of America applicable to persons under the jurisdiction of the Commonwealth of Puerto Rico."

In the sixth and seventh paragraphs of the verified complaint, the petitioners reserve the federal claims in order to comply with the requirements of the cases of *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) and *Government and Civic Employees Organizing Committee* v. *Windsor*, 353 U.S. 364 (1957).

Petitioners allege that Act No. 37, that amends section 4(a) of article 6 of Act No. 143 of June 30, 1969[6] and also adds article 21-A, is unconstitutional because by exempting the beers manufactured in Puerto Rico from the excise imposed by this law it discriminates in favor of the local beers and against the beers manufactured in the United States. They ground their petition on section 1 of article II of the Constitution of the Commonwealth that provides that "[n]o discrimination shall be made on account of origin . . ." They also invoke the clauses of due process of law and equal protection of the laws of Section 7 of article II of our Constitution. They believe that "[u]nder the terms of these provisions of the Constitution of the Commonwealth, the Legislative Assembly cannot utilize its taxing power to discriminate against beer produced by the plaintiff brewers in the United States in favor of the beer produced in Puerto Rico."

In order to establish the unconstitutionality of the statute, the petitioners resort to alleged statements in connection with House Bill 841,[7] made by the Honorable Jose Granados Navedo, by the Press Aide of the Governor and by the Chairman of the Board of Directors of India Brewery, as published in various newspapers of the country; to articles published in the dailies *El Mundo* and *San Juan Star*; to statements presented in the public hearings held by the Finance Committee of the House and the

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[6] Known as the Alcoholic Beverages Act of Puerto Rico, 13 L.P.R.A. 6006, et seq.

[7] It later became Act No. 37 of July 13, 1978.

Senate and the House Committees of Industrial Development and of Commerce and Industry; to the reports filed in both houses of the Legislative Assembly by the committees that considered the bill; and to a preliminary survey of the beer industry prepared in March 1978 by the Office of Economic Matters of the Economic Development Administration. They adduce that the previously mentioned attachments are part of the legislative history of Act No. 37. They believe that "the governmental authorities responsible for the approval of this statute themselves took care of demonstrating that the purpose of the same is that the plaintiff-brewers suffer serious irreparable damage utilizing . . . the taxing mechanism . . . as a protectionist mechanism."

The petitioners add that the injunction proceeding is the only adequate remedy that they have at their disposal to restrain the immediate and irreparable damage that Act No. 37 will produce in their economic position in the beer market since as they are not taxpayers they cannot use the remedy of a refund of taxes established by article 2 of Act No. 235 of May 10, 1949, as amended (13 L.P.R.A. 282). Nor can they use the remedy provided in Article 2 of Act No. 104 of June 29, 1955 (Suits Against The Commonwealth of Puerto Rico Act, 32 L.P.R.A. 3074 *et seq.*) because the amount of indemnity is limited to a sum that is negligible in comparison with the amount of the irreparable economic damage that the petitioners will suffer.

For their part, the respondents allege that the excise imposed by Act No. 37 falls on beer produced locally as well as on imported beer. They contend that the law is constitutional since it establishes a reasonable classification in its article 21-A where a special exemption is provided to the manufacturers whose annual production has not exceeded thirty-one million wine gallons, and that also meet the requirements established in said article. They

raise, among others, as affirmative defenses: that the petitioners do not have standing to bring this cause of action; that there is a lack of indispensable parties; and they question the capacity and authority of the U.S. Brewers Association to appear in representation of all its members.[8]

After the request for a temporary restraining order was denied, the hearing on the preliminary injunction was held on August 4, 1978. To prove that the issuance of the writ was in order, the petitioners rested on the facts alleged in the verified complaint. The Court, after hearing the contentions of the parties, issued its order in open court, denying the request of the petitioners on the grounds that they had not presented sufficient proof to sustain the issuance of the writ. It ruled that even were the averments of the verified complaint true, it is the duty of the petitioners to show the appropriateness of the issuance of the writ.[9] It found that neither had they complied with the requirements established by our Supreme Court in *Puerto Rico Telephone Co.* v. *Superior Court*, 103 D.P.R. 200 (1975), and *Puerto Rico Ports Authority* v. *Superior Court*, 103 D.P.R. 903 (1975).[10] Although it is true that the Court acknowledged the right of the petitioners to request the issuance of an injunction under Act No. 12 of August 8, 1974 that amends article 678 of the Code of Civil Procedure,

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[8] Even though the respondents in their answer raised certain affirmative defenses they did not support them in the hearings nor in their memorandum of law. The affirmative defenses of the respondents will not be the subject of discussion in this opinion since it is the duty of the parties to sustain their positions. We believe that the petitioners have standing to request the remedies of declaratory judgment and injunction since there are involved constitutional rights that could be adversely affected.

[9] The application of the petitioners rested basically on *Las Monjas Racing Corporation* v. *Insular Racing Commission*, 67 P.R.R. 42 (1947).

[10] These norms were adapted from Wright and Miller, *Federal Practice and Procedure*, Vol. 11, pp. 430-431.

(32 L.P.R.A. 3524), the petitioners, as we have stated, could not convince us that it was in order to grant the remedy requested. Finally, the hearing on the issuance of the permanent injunction and for the discussion of the issues relating to the constitutionality of the law was set for August 11, 1978. The respondents were ordered to present their responsive allegations and to make use of the mechanisms of discovery of proof before the date fixed for the hearing.

For the purposes of simplifying and limiting the questions in litigation and to expedite the proceedings, on August 11, 1978 the parties met in chambers with the Judge that signed the present opinion. In said meeting stipulations of fact were made, the documents to be marked as exhibits of each of the parties were submitted[11] and documents were presented that were considered as evidence offered, not identified and not admitted.[12] Also, we heard the argument of the Legislative Assembly and of the *San Juan Star* in opposition to the presentation of officials and

[11] The documentary proof of the petitioners consisted of eleven documents marked as Exhibits 1 to 11, in greater part to demonstrate the legislative intention. The respondents presented as documentary evidence: photocopies of the ptitions for exemption filed by the Champale and Hofbrau breweries; the transcript of the public hearing in connection with House Bill 841; photocopy of a memorandum sent by the Acting Administrator of the Eeconmic Development Administration to the Chairmen of the legislative Committees that considered House Bill 841; and some answers to the Request for Admissions.

[12] Under this classification the newspaper clippings of articles published in the dailies *San Juan Star* and *El Mundo* are considered. In said articles the journalists cite alleged statements of the Hon. Jose Granados Navedo, of Antonio Quinones Calderon and of Luis Deynes Feijoo. The petitioners intended to establish that the Court can take judicial notice of such statements since they constitute historical facts and facts of general knowledge. We ruled that the signing of House Bill 841 by the Governor and its conversion into law is the only fact of which we can take judicial notice.

employees of the Legislature and of journalists as witnesses for the petitioners.[13]

On August 14 the case was submitted on the basis of the stipulations and the documentary proof presented. The petitioners were granted until August 21 to submit their memorandum of law and the respondents ten days starting with the notification of the petitioners' memorandum to submit a memorandum in support of their contentions. Additionally, the petitioners were granted five days commencing with the date on which they were served with the memorandum of the respondents to submit an additional reply memorandum.[14]

Based on the documentary proof submitted[15] and the stipulations of the parties, we make the following:

[13] The representatives of the Legislative Assembly based their opposition to the *subpoena testificandum* and to the *subpoena duces tecum* issued to the officials Isabel Diaz de Torres and Nelson Soto on the fact that the By-Laws of both Houses establish that subpoenaes directed to the officials and employees of the Legislative branch must be made through the offices of the presiding officers of the Houses. Nevertheless, the testimony of said officials became unnecessary since there had been admitted into evidence the documents requested of them by the petitioners.

The petitioners wished to use Tomas Stella, journalist of the *San Juan Star*, to establish alleged statements that they believed to be part of the legislative history of Act No. 37. These statements were made to Stella by Luis Deynes Feijoo the day on which the bill was filed. The position of the newspaper was grounded on the First Amendment of the Constitution of the United States and section 4 of Article II of our Constitution. It was not shown that Deynes Feijoo was the intellectual author of the measure and given the fact that he had been subpoenaed as a witness for the petitioners, Stella was relieved of the duty to testify, without prejudice in case it was necessary to subpoenae him to impeach the testimony of Deynes Feijoo.

[14] The petitioners filed their first memorandum on August 21 and the respondents filed theirs on September 5, 1978. On September 13, 1978 the petitioners filed their reply memorandum.

[15] In view of the voluminous documentary evidence presented by both parties and that the great majority of said documents are directed to proving the legislative intention, in making these

FINDINGS OF FACT

1. The petitioner United States Brewers Association, Inc. is a trade association incorporated under the laws of the State of New York and represents thirty-four producers of beer sold in the United States. Anheuser-Bush (sic), Inc. is a corporation organized under the laws of the state of Missouri and has its principal office of business in this state. Carling National Breweries, Inc. is a corporation organized under the laws of the state of Virginia and has its principal office of business in the state of Maryland. Miller's Brewing Company and Jos. Schlitz Brewing Company are incorporated in the state of Wisconsin and also have their principal offices of business in this state. The F. & M. Schaefer Brewing Company is a corporation organized under the laws of New York and also has its principal office of business in this state.

2. The respondent Julio Cesar Perez is the Secretary of Treasury of the Commonwealth of Puerto Rico and as such is authorized by Act No. 143 of June 30, 1969 (Alcohol Beverages Act of Puerto Rico) to administer and enforce its provisions. Mr. Luis Deynes Feijoo is the Director of the Alcoholic Beverages Bureau of the Department of Treasury and under the terms of article 121 of Act No. 143 of June 30, 1969 (13 L.P.R.A. 6121) administers the Bureau.

3. Of the thirty-four members of the U.S. Brewers Association, Inc., eighteen of them produce annually more than thirty-one million gallons of beer. Among these eighteen members are found the five petitioner breweries who sell beer in Puerto Rico. They cannot qualify for the exemption provided in article 21-A of the law because the

Findings of Fact we have limited ourselves to making findings relating to the facts that we consider of greater relevancy in resolving the controversy presented. Nevertheless, the information contained in some of these documents will be used in the discussion of the questions of law presented.

annual production of each of these eighteen breweries exceeds thirty-one million gallons of beer.[16]

4. The India and Corona breweries are local beer producers. Hofbrau beer is produced in Germany and Champale in the United States. These four breweries, under article 21-A of the law filed their exemption application in the Office of Tax Exemption and already are enjoying the same.[17]

5. The Corona and Champale breweries are members of the U.S. Brewers Association, Inc. but they did not individually join in the present action.

6. The Pabst brewery, whose annual production exceeds thirty-one million gallons, is a member of the U.S. Brewers Association, Inc. This brewery sells beer in Puerto Rico, but did not individually join in the present action.[18]

7. The beer produced by the five petitioner breweries is imported into Puerto Rico by independent distributors. The tax of Act No. 37 is paid by these importers distributors.[19]

8. House Bill 841, filed on May 24, 1978, was an administration bill prepared by the Department of the Treasury.

9. The U.S. Brewers Association, Inc. filed the present action in the name of and in representation of its thirty-four members, since it believes that the tax amendment of Section 4(a) of article 6 of Act No. 143 of June 30, 1969 (Alcohol Beverages Act of Puerto Rico) affects its members in the economic position that they hold in the market, even though, in the case of beer imported into Puerto Rico, the tax of Act No. 37 is paid by the importer distributor. Five member breweries of the association joined the suit separately because they too believe that they would be economically affected by the amendment of the Alcohol

[16] Fact stipulated by the parties.
[17] Fact stipulated by the parties.
[18] Fact stipulated by the parties.
[19] In this case it is not necessary to determine whether the payment of this tax falls on the retailer or on the consumer.

Beverages Act of Puerto Rico. Petitioners believe that the beer produced in Puerto Rico will be sold at a price lower than the imported beer since this excise falling on the foreign beer (North American and European) will cause a price increase at the level of the consumer. They believe that the consumer will then prefer the locally produced beer and economic damage will be caused to the petitioners by the reduction that they will have in the market. The petitioners did not present any proof in support of these allegations.

10. When House Bill 841 was discussed at public hearings, the U.S. Brewers Association opposed the additional tax of 55¢ on the grounds that it was excessively high, but nevertheless agreed that an excise of 20¢ per gallon was reasonable for those breweries that produced more than thirty-one million gallons. The representative of the association agreed at that time that the small breweries should be helped, but opposed the tax of $1.60 considering it excessive. See pages 5-3 to 5-10 of the transcript of the public hearing held on June 2, 1978 before the legislative committee that considered House Bill 841.

11. The U.S. Brewers Association, Inc. arranged for its members to support Bill No. 3605 of the House of Representatives of the Congress of the United States[20] that provides tax relief to the small domestic North American breweries by means of a reduction in the tax for the production of the first sixty thousand (60,000) barrels of beer. Although both pieces of legislation—Public Law 94-529 and Act No. 37—provide help to the small beer industry[21] the mechanisms utilized to implement the measure are different.

[20] On October 17, 1976 it became Public Law 94-529 (90 Stat 2485, 26 USC 1563 and 5051).

[21] For our decision about this aspect, see pages 44 and 45 of this opinion.

Our final decision is not affected in any way by this action of the U.S. Brewers Association, Inc.

In accordance with the preceding Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW:

By means of the Organic Acts of 1900 and 1917 the Federal Congress already granted to Puerto Rico powers similar to those of a state of the Union. Among said powers was that of levying taxes. In *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1927), at pages 261 and 262, the federal Supreme Court stated that:

> "The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories. The effect was to confer upon the territory many of the attributes of equal sovereignty possessed by the states—as, for example, immunity from suit without their consent.
>
> By those acts, the typical American governmental structure, consisting of the three independent departments — legislative, executive and judicial — was erected. 'A body politic' — a commonwealth — was created. *The power of taxation, the power to enact and enforce laws, and other characteristically governmental powers were vested. And, so far as local matters are concerned, as we have already shown in respect of the continental territories, legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislatures.*" (citations omitted and emphasis supplied.)[22]

[22] Cited and translated in *Porto Rico Telephone Company* v. *Tax Court*, 81 P.R.R. 948, 958-959 (1960).

Later, by virtue of the compact with the United States[23] Puerto Rico was granted "taxing powers greater than the states of the Union in partial compensation for its lack of representation in the Congress." *Postley* v. *Secretary of Treasury*, 75 P.R.R. 822, 843 (1954); *Rivera* v. *Buscaglia*, 146 F.2d 761 (1944).

Analyzing the existing relations between the United States and Puerto Rico our Supreme Court tells us *R.C.A. Communications, Inc.* v. *Government of the Capital*, 91 P.R.R. 404 (1964), at pages 415 and 416, that:

> /U/nlike the territorial systems of the Foraker Act and the Organic Act of 1917 consisting of authority and powers merely delegated by Congress and subject to its supervision, *the public and governmental powers of the Commonwealth of Puerto Rico within its exclusive authority, the most fundamental of which is to levy tax in common essence with its creation as a body politic and essential to its subsistence and its survival as a state, flow from itself and from its own authority and it being exclusive as respects its taxing power, it exercises this power free of any higher authority, subject only to the limitations of its own Constitution and its Bill of Rights, which Congress* already determined was not inconsistent with the applicable provisions of the Constitution of the United States, *and with those obligations which the people imposed on itself in accepting the federal relations which were to exist and do exist with the United States pursuant to Act. No. 600.* It is true that there is still in section 3 of the Federal Relations Act a residual expression that taxes and assessments may be imposed on property . . . for the purposes of the insular and municipal governments. *However, the fundamental taxing power of the Commonwealth does not rest or depend any longer on that expression characteristic of a former time when authority was delegated.* It is there because originally it was part of section 3 of the Organic Act of 1917, which section was from the very beginning essentially a regulation of relations with the United States respecting the imposition of taxes and still is essentially under the Federal Relations Act, for which reason it subsisted, particularly since the provisions on debt-incurring capacity were eliminated from Section 3 by Act No. 87-121 of August 3, 1961, 75 Stat. 245." (emphasis supplied).

[23] Public Law 600 of the Eighty-first Congress of the United States, approved on July 3, 1950.

The inherent power of our Legislative Assembly to impose taxes is evident. This power emanates from section 2 of article VI of our Constitution and is subject to the limitations imposed by our Constitution and by the Federal Relations Act.

The ample discretion that the Legislature possesses in the tax field has been recognized for some time. *Miranda* v. *Secretary of Treasury*, 77 P.R.R. 159, 165 (1954), and the power of the Legislative Assemblies to regulate this field is plenary. *Madden* v. *Kentucky*, 309 U.S. 83, 93 (1939). In this area more than in any other, the legislatures possess the greatest freedom to classify. *C. H. Vehicle Leasing Corp.* v. *Commonwealth*, decided on March 31, 1978, 78 S.Ct.J. 29; *Citizens Telephone Company* v. *Fuller*, 229 U.S. 322, 329 (1912). Nevertheless, the Legislature cannot use this power, that is not absolute, in any arbitrary or capricious manner. *Miranda* v. *Secretary of Treasury, supra.* It is presumed that in passing tax laws the legislatures act within the boundaries of their constitutional powers, although, in the classification there is not exact equality. *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). Upon creating classes, the action of the Legislative Assembly should be presumed valid. *Hermina Gon-*

zalez v. *Silva Recio*, decided October 5, 1978, 78 S.C.J. 71; *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 314 (1976).

The constitutional clause relating to the equal protection of the laws does not impede the state from making a reasonable classification of property, persons or corporations, for the purpose of imposing taxes. *M. J. and S. Cabrera* v. *Sancho Bonet*, 59 P.R.R. 535, 540 (1941). But the classification in tax statutes criterion, rule or distinction. Nor should it be arbitrary, oppressive, hostile, capricious, illusory or evanescent.[24]

In *Nebbia* v. *New York*, 291 U.S. 502 (1934), the federal Supreme Court states that the guarantees of due process of law require only that a law not be unreasonable, arbitrary or capricious, and that the means selected have some real and substantial relation to the objective pursued. Besides it tells us that the reasonability of each statute depends on the relevant facts.

All that is required to comply with the requirements of due process of law is that there exist a sufficient connection between the power to tax of the state and the activities or events subject to taxation, and that it is satisfied by merely determining if the state has offered or granted benefits, protection or advantages. *CH Vehicle Leasing Corp.* v. *Commonwealth*, *supra*; *Libby, McNeill* v. *Secretary of the Treasury*, 82 P.R.R. 377, 385 (1961).

In order for a tax law to be unconstitutional under the due process of law clause it ought to be so arbitrary that it results in a confiscation or in a crass and patent inequity or injustice. *CH Vehicle Leasing Corp.* v. *Commonwealth*, *supra*; *Buscaglia* v. *Tax Court*, 68 P.R.R. 322, 336 (1948).

In a classification there cannot be an exact exclusion or inclusion of persons or things. *Magoun* v. *Illinois Trust*

[24] See 71 American Jurisprudence 2d, State and Local Taxation, sec. 175 and cases cited there.

& Savings Bank, 170 U.S. 283, 295 (1898). A classification does not have to be made with scientific or mathematical precision. In the inclusion or exclusion of persons or things the rule of equality does not have to be absolute, but a substantial or reasonable precision is the criterion to be followed. *Henderson Budge Company* v. *Henderson*, 173 U.S. 592, 614 (1898). In *Lindsey* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911), at pages 78 and 79, the federal Supreme Court established the following norms to determine if a tax law infringes the constitutional clause that guarantees equal protection of the laws:

> "The rules by which this contention must be tested, as is shown in repeated decisions of this court, are these: 1. The equal-protection clause of the 14th Amendment does not take from the state power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is *purely* arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

In order for a classification to be valid it is necessary that there exist a reasonable basis. The classification must be reasonably related to the object of the legislation and should be based on some distinction that can rationally and impartially constitute the reason for the difference in

the tax. *San Juan Trading Co.* v. *Sancho Bonet*, 114 F.2d 969, 971 (1940).[25] The presumption of constitutionality can only be defeated with the most exact showing that a classification is a hostile and oppressive discrimination against certain persons or classes. *Madden* v. *Kentucky*, *supra*, 88. He who impeaches the classification established in a law has the burden of proof to demonstrate that it does not rest on a reasonable basis and that it is essentially arbitrary. *Miranda* v. *Secretary of Treasury*, *supra*, 179.

When the classification is not arbitrary and rests on a reasonable basis, discrimination does not exist as a result of the fact that tax is imposed on one class and another is exempted, that taxes at different rates are imposed or that exemptions are granted to some and not to others. *M. J. & S. Carrero* v. *Sancho Bonet*, *supra*. As long as the classifications are not arbitrary or affect in discriminatory manner the taxpayers included in the class or exemption, the legislative action should be sustained. *Rivera* v. *Court*, 62 P.R.R. 491, 507 (1943).

The end pursued by the classification is of importance in determining the constitutionality of a tax statute only as far as it serves to show that the discrimination is not invidious. *Colgate* v. *Harvey*, 296 U.S. 404, 438 (1935).[26] A statutory discrimination will not be annulled if a fact situation that justifies it can reasonably be conceived. *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947). In *Nebbia* v. *New York*, *supra*, it was established that:

> "[I]t is equally clear that if the legislation policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of necessity of such an enactment, that every possible presumption is in form of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

[25] Cited and translated in *Miranda* v. *Secretary of Treasury*, *supra*, 179.

[26] Dissenting Opinion of Judge Stone that is the prevailing opinion after *Colgate* was overruled by *Madden*.

To determine the constitutionality of the statute in question this Court believes that said piece of legislation should be submitted to scrutiny and the classification analyzed in the light of one of the three criteria or levels formulated in recent years by the Supreme Court of the United States.

The acid test of legislative classifications has had a development that goes from the traditional criteria to strict judicial scrutiny. *Hermina Gonzalez* v. *Silva Recio*, *supra*. In *Zachry International* v. *Superior Court*, 104 D.P.R. 267 (1975), our Supreme Court, at pages 277 and 278, analyzes two of three criteria.

The first criterion, known as the minimal traditional analysis (*"traditional" equal protection analysis*, provides that legislative classification should not be invalidated unless it is clearly arbitrary and no rational nexus can be established between the same and a legitimate State interest. Under this formula, laws have been interpreted as constitutional if a fact situation that justifies the classification can be reasonably conceived.

The second criterion, as a reaction to the dissatisfaction created by the first, establishes that when the classification affects fundamental rights of the citizen and is directed

against a suspect class, the same is subject to strict judicial scrutiny. A "suspect class" is that in which the class has no relation with the ability or aptitude of the persons affected by the classification. The State has the obligation to show the existence of a compelling state interest or of superior hierarchy (*compelling state interest*) that justifies the classification and that the same necessarily promotes the attainment of that interest. This criterion has been applied to certain laws that establish suspect distinctions, such as those based on race, nationality, citizenship, poverty or birth.

Subsequently, in *Craig* v. *Boren*, 429 U.S. 190 (1976), a third criterion was structured that corresponds to an intermediate analysis, more rigorous than the traditional minimal criterion, but less than strict scrutiny. *Hermina Gonzalez* v. *Silva Recio*, *supra*, dissenting opinion of the Chief Judge. In *Craig* v. *Boren*, *supra*, the criterion or measure (standard) that the Court enunciates establishes that classification by reason of sex ought to serve important governmental objectives and ought to be substantially related to the attainment of said objectives.

In the cases in which economic interests are involved, the impeached statute is analyzed following the norms of the least rigorous scrutiny (traditional minimal criterion). *Craig* v. *Boren*, *supra*, 207; *Joseph E. Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 47-48 (1966).

Since we deal with a tax statute, we shall analyze this piece of legislation in the light of the norms contained in the traditional analysis and of the general principles stated above. But before entering into our discussion of the constitutionality of Act No. 37, we believe it pertinent to make some observations about the contentions of the parties with respect to the legislative intention.

When the law is clear and free of all ambiguity, the letter of the law should not be disregarded under the

pretext of fulfilling its spirit. Article 14, *Civil Code*, 1930 edition (31 L.P.R.A. section 14). It is also a general principle of law that the most effective means to discover the true sense of a law, when its expressions are doubtful, is to consider the reason and spirit of the law or the cause or motives that induced the legislative power to adopt it. Article 19, *Civil Code*, 1930 edition (31 L.P.R.A. section 19). It has been decided by our Supreme Court in *Rodriguez Rodriguez* v. *Governor*, 91 P.R.R. 95 (1964), that the clear text of the law is the expression par excellence of the legislative intent.

The petitioners cite extensive jurisprudence in the support of their contention that we should refer to the legislative intent where it is shown that the purpose and motive of the members of the Legislative Assembly in approving the statute under constitutional attack was to discriminate in favor of local industry and against foreign industry. Such jurisprudence is reiterative of the general principle, already cited, that in the fact of doubtful phrases or expressions the Court will refer to the reason or motive that induced the legislative power to approve said law. They likewise pretend that we consider as part of the legislative intent of Act No. 37 explanatory memoranda of governmental agencies; statement of officers of the executive branch; statements of legislators that were not members of the committees that considered House Bill 841; the preliminary bill drafted in the Department of Treasury; an isolated phrase of an explanatory memorandum of another bill (House Bill 798); a survey of the beer industry done by the Economic Development Administration; statements of private persons and officials of the executive branch, presented in the public hearings held on June 1 and 2, 1978 before the legislative committees that considered House Bill 841. We believe that the preceding enumeration does not constitute part of the legislative intent because if we

were to so decide we would be extending excessively the ambit of a highly debatable criterion.[27] To recognize that the preceding enumeration constitutes legislative intent would amount to concluding that the legislator accepted without question or analysis, nor did scrutiny nor discernment on his part intervene, in the approval of Act. No. 37.[28] A practice of this type constitutes a disregard of the legis-

[28] Although House Bill 841 was originally drafted by an agency of the executive branch, said bill was considered by legislative committees where amendments were made to the bill prepared by the Department of Treasury.

[27] About legislative intent we are told in *Sutherland Statutory Construction*, Vol. 2A, section 45.06:

> "Whether legislative intent is a meaningful and valid concept for use as a criterion for deciding questions of statutory interpretation has been a classic subject of debate. Since an intention is a mental state and only individual persons have minds, only an individual can have an intention. It follows that the idea of a legislative intent must be regarded as a fiction or a figure of speech. Professor Radin, in a perceptive analysis, has observed, further, 'that the intention of the legislature is undiscoverable in any real sense . . . That chances that several hundred men each will have exactly the same determinate conception in mind as possible reductions of a given determinable, are infinitesimally small'. This view posits that the concept of a legislative intent is useful only if it is understood as the sum of the individual ideas, views, and attitudes of all the members of the legislature. An incisive reply by Professor Landis posited in effect, that a legislative intent can be distinguished from the kind of subjective intent which is entertained by individual legislators and that such a concept is a useful and protective one in the judicial process on questions of statutory construction. To insist that each individual legislator besides his aye vote must also have expressed the meaning he attaches to the bill as a condition precedent to predicating an intent on the part of the legislature, is to disregard the realities of legislative procedure. Just as nobody ever saw the reasonably prudent man who is used as standard of judgment in tort law, the extent of its use confirms that an abstract, nonsubjective, conception of legislative intent, as a reference to the composite or net meaning that is communicated by operation of the process of enactment applied to a statutory text, is a useful standard of judgment in statutory construction."

lative function and the separation of powers, foundation and basis of our democratic system of government.[29]

In *Porto Rico Telephone Co.* v. *Tax Court*, 81 P.R.R. 948 (1960) at page 963, the various elements of public policy that are the basis of the legislative determination are set forth:

> "*The determination of the legislature relies on varied elements of public policy, the scrutiny of which is beyond the competence of judges.* The approval of a tax measure requires the careful study of difficult political, social and administrative problems, and above all, the weighing of the economic effect of the new tax on consumption, expenditures, production, employment, income and savings." (emphasis supplied).

Although we are of the opinion that the statute is clear on its face[30] and there exist no ambiguities nor doubtful phrases, upon applying the standard with which a statute

[29] Explaining the legislative process, R. Elfren Bernier in Approval and interpretation of the laws of Puerto Rico states that after a bill is filed in the office of the Clerk of either of the two Houses, the President of the body where the bill originates refers it to the corresponding committee for the purposes of considering it and returning it with a written report of its recommendations. If the committee believes that the bill should be considered it calls the authors, governmental officials or other persons that it wishes to hear with respect to the same. In addition, they may hold public hearings for the purposes of obtaining more information about the bill. In its report, the committee may recommend that the bill be approved with or without amendments, that it be defeated or that it be left on the table of the committee. Later the bill passes to the House for consideration where the text of the bill itself and the report of the committee are read. If the bill is approved it is referred to the Committee on Printing, Style and Enrollment for revision of the language utilized and the style. The bill returns to the House for final vote and if it is approved, it is sent immediately to the other house for its consideration where an identical procedure is followed to that which was followed in the house in which it originated.

[30] The parties also believe that the statute is not unconstitutional on its face.

should comply in order not to violate the constitutional clauses of equal protection of the laws and due process of law we find it necessary to refer to the legislative history of the act. This scrutiny is indispensable for the purpose of determining if there was a legitimate end that induced the approval of the statute; if the norm or measure adopted is reasonable; and, finally, if there exists a nexus or reasonable relationship between the objective and the measure.

We should not forget the statements of the Court of Appeals for the First Circuit in *Sancho* v. *Bacardi Corporation of America*, 109 F.2d 57 (1940):

> "The legislative purpose to protect the renascent liquor industry of Puerto Rico from all competition by foreign capital, so as to avoid the increase and growth of financial absenteeism and to favor this domestic industry and to protect it against any unfair competition, was legitimate. And we may not strike down any legislation designed to effectuate such purpose just because it may be thought unlikely completely to accomplish the desired result. Whether the statutes prohibiting the use of certain trade marks and corporate names and whether the legislation forbidding shipments in bulk (presumably passed in part to prevent an evasion of the trade mark prohibition) will accomplish the desired result is not the question for our determination. The Legislature of Puerto Rico possessing 'substantially all the local legislation powers of a state legislature, in all respects here involved' including the local police powers particularly applicable to the liquor business, has manifested its faith in the efficacy of its policy through three successive sessions, the session of 1936, the special session of 1936 and the regular session of 1937, and it is not for us to say whether its faith is well founded. Even if we knew enough about the matter to form a judgment

> as to the wisdom of these statutes we should be exceeding our function were we to attempt to substitute our judgment for that of the Legislature. As said by the Supreme Court, in Nebbia v. New York, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940, 89 A.L.R. 1469 'with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.' " (page 65).

Act No. 37 imposes by its first article an excise of $1.60 per wine gallon on all beer produced, manufactured, imported, or introduced into Puerto Rico. It establishes a special exemption by persons whose production of beer during the most recent tax year has not exceeded thirty-one million gallons of beer; instead of paying the tax of $1.60 they will pay only $1.05 per wine gallon of beer, subject to compliance with the grant of exemption given by the Office of Industrial Tax Exemption. The grantee ought to maintain the level of employment established in the grant of exemption, taking as a base the level of employment prevailing on May 31, 1978. Should it fail to do so it will be subject to the following alternatives:

> a) In case the grantee finds itself obliged to maintain a level of employment lower than the level required by the exemption, but not less than ninety percent (90%), it will be obliged to notify this fact to the director of the Office of Tax Exemption, stating the reasons that justify the reduction.

b) In cases (sic) the grantee finds itself obliged to reduce the level of employment to a figure lower than ninety percent (90%) of the level required by the exemption, an application should be filed by means of a verified petition before the director of the Office of Tax Exemption, with a copy to the Secretaries of Treasury and of Labor, in which the reduction is justified.

In both situations the Director will take into consideration the arguments adduced by the grantee to justify the necessity for the reduction in employment. The Director may cancel the exemption in those cases in which the grantee does not comply with the corresponding alternative or may reduce the rate of exemption in proportion to the relationship that exists between the number of reduced employment and the level of employment established in the grant.

The Legislative Assembly upon considering House Bill 841 had before it some realities that established the necessity for approving this bill. With this bill it was intended, in addition to increasing the collection for the public treasury, "to create a tax mechanism for protecting the beer industry and to contribute to the creation of a climate of greater competition with the large scale beer industry." (Report of the Finance Committee of the House of Representatives.)

This Court believes that, for the purposes of obtaining a better perspective about Act No. 37 and the objectives that induced the legislature to approve the statute, it is necessary to refer to the development of the Puerto Rican beer industry. The information, in great part, was obtained from the *Economic Survey of the Local Beer Industry* prepared in March, 1978 by the Office of Economic Surveys of the Economic Development Administration. This report was presented as evidence by the petitioners (Exhibit 10).

The beer industry started in Puerto Rico in the year 1934 with the establishment of the Corona brewery in San Juan. Three years later the India Brewery was established in Mayaguez. In the year 1949 the Real Brewery was established, but it ceased operations in the year 1958. The Amstel Brewery was established in 1963 and due to difficulties in penetrating the market it found itself obliged to sell to Schlitz. Later, Schlitz, due to an insufficient market, found itself obliged to cease its manufacturing operations in the year 1969. Finally in the year 1968, the last attempt to establish a local brewery was made. In that year Criolla Brewery was established and it subsisted in the market until the year 1973 in which it too ceased operations.[31]

In the year 1937 this industry employed some 185 persons and in 1969 it reached close to 1,900 employees.[32] Presently it provides direct employment to some 1,500 persons.[33] In November 1977, the average hourly wage paid to the production workers in the beer industry was $3.37 and also, its employees were paid a weekly wage of $138.00 while the manufacturing industry at that time paid its workers an average hourly wage of $3.10 and paid a weekly wage of $116.25.[34]

The beer industry is an important contributor to the public treasury since in addition to paying income taxes when earnings are realized, property and business taxes, it pays significant excises on the sale of its products.

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[31] Economic Development Administration, *Economic Survey of the Local Beer Industry*, page 5.

[32] Ibid, pages 5-6.

[33] The said report states on page 16 that the alcoholic beverages industry employed in 1977 a total of 2,946 persons. According to information contained in the last census of manufacturing of the Department of Labor, it is noted that the local beer industry is responsible for more than half of the total employment of the alcoholic beverages industry.

[34] Ibid, pages 16-17.

The magnitude of the contribution of the beer industry goes far beyond its contribution to the treasury given the fact that other industries depend on the beer industry, among these: the industry of manufacture of cans, of bottles, of labels, of cardboard containers and of caps. Also the service sector, although to a lesser degree, is affected by the course of development of this industry.[35] It is estimated that for each job that is generated in the beer industry an additional job is created in diverse sectors such as services, commerce and Government, among others.[36]

The local beer market, amounting to 46.8 million gallons, represents more than double the market 15 years ago, which amounted to 22.4 million gallons in fiscal year 1962-1963.[37] While the local annual production dropped from 21.2 million gallons in fiscal year 1962-63 to 12.2 million gallons in fiscal year 1976-77, the consumption of imported beer increased from 1.2 million gallons in fiscal year 1962-63 34.6 million gallons in 1976-1977.[38] This information reveals that although the total consumption of beer has been rising, the beer manufactured in Puerto Rico has been displaced consistently by imported beer. In the fiscal year 1962-62 the local production of beer constituted 94.7% of the total market while for the months between July and December of 1978 it dropped to 26.5% after having registered in that period a constantly diminishing rate.[39]

In the year 1971 the Government took measures to counteract the crisis through which the local beer industry

[35] Ibid, page 27.

[36] Ibid, page 20.

[37] Ibid, page 43. Information obtained from the Bureau of Alcoholic Beverages.

[38] Ibid, page 44.

[39] Ibid, page 49.

was passing upon finding itself gradually displaced by foreign beer. Since at that time only 45% of locally produced beer supplied the beer market,[40] a General Program of Aid and Promotion of the Beer Industry was implemented, created by Joint Resolutions of the House Numbers 6 of July 7, 1971 and 15 of April 24, 1972.[41] The original resolution assigned to the Economic Development Administration four million dollars to be utilized during twelve months in the development of this program of aid and the second resolution assigned four million dollars to be utilized in twenty-four months.[42] Of the total of funds assigned to this program[43] there was disbursed a total of $7.4 million employed in publicity (32.2%), gifts of beer (20.4%), expenses of advertising agents and expenses of vehicles (11.0%), promotions (20.4%), exclusive concessions (1.1%), salaries of the Marketing Department (5.6%), control of production quality (6.2%), and convenience packaging (3.1%).[44]

A constantly rising tendency in the local consumption of beer is evident. It is also a fact that imported beer in recent years has been substituting locally produced beer

[40] Ibid, page 8.

[41] Ibid, page 10.

[42] Ibid. It was not possible to consider the utilization of funds for the long term improvement of the industry due to the emergency situation at the moment.

[43] The funds were disbursed to the local breweries on the basis of their production in the following form:

> "In order to determine the amount of such disbursements, there will be taken as a basis the relationship existing between the amount of beer produced by each petitioner in Puerto Rico in each month, commencing with the month of July 1971, and the total of beer produced in Puerto Rico during the same period, until and including June 30, 1972. The percentage that results from said comparison will be considered as the monthly maximum index of disbursement that a petitioner may receive after the month of comparison."

[44] Ibid, page 11.

consistently. The price differential does not constitute, in our opinion, a conclusive factor in the preferences of the consumers, but rather that the latter may be attributed to other factors, such as habits, advertising, customs, etc.

The local beer industry is passing through a crisis upon finding itself displaced by imported beer. This gradual displacement does not only affect the beer industry but other areas are also affected. Should this diminishing rate continue in the consumption of beer produced in the Island damage could result to: the workers who labor in this industry, increasing, at the same time, unemployment; the public treasury in the areas of property taxes and income taxes; other industries, such as the manufacture of cans, bottles, labels, cardboard containers and caps; and other sectors among which there are found services, commerce and government.

The local industry, in an attempt to obtain a significant participation in the market, has redirected its promotion campaign and the two local breweries have been changed their packages for the purpose of competing more effectively with beer that comes from the exterior. Although at the end of the past semester our industry had a good period in which it reached 42% of the local market in the month of November, the situation continued being quite erratic and uncertain in view of the fact that in the month of December the consumption of beer produced locally dropped to 24%.[45]

It is impossible to analyze the constitutionality of a tax law within theoretical concepts, it being necessary to look for the reality involved. The true nature of a tax is fixed by its incidence and when there is controversy with respect to the fact of whether a tax contravenes constitutionally guaranteed rights, it is not the form of the same, nor its

[45] Ibid, page 52.

definition or interpretation that makes the case, but rather the practical effect or consequences of said tax as a question of reality, in its application and operation. *Maristany* v. *Secretary of the Treasury*, 94 P.R.R. 276, 284 (1967); *Commissioner* v. *Hansen*, 360 U.S. 446, 461 (1959). Tax controversies are to be considered in the practical sense of the reality involved without legal fictions or subleties entering into play. *Maristany* v. *Secretary of the Treasury, supra.*

Within the frame of the realities involved it is that we analyze the law under attack. We believe that the objective which inspired the law is legitimate: the desire to try to protect and attain the welfare of an industry that is passing through a critical situation. This law not only intends to protect the local beer industry but also jointly to serve as a protectionist mechanism for other industries and the public treasury. If the result of this law is to produce a substitution in the preferences or tastes of consumers, this is not a criterion for decision by a court of justice. Nor is it within our ability to determine whether locally produced beer will displace foreign beer in the market. We understand that the two preceding assertions are subject to criteria as subjective as are the taste, habit, custom and preference of the consumer.

After concluding that the wish of the legislator is legitimate it is necessary to analyze the reasonability of the classification, if the measure adopted for the protection of an industry is the most adequate and the existing nexus between the end pursued and said measure. We should not forget that the reasonability of the statute, as expressed in *Nebbia* v. *New York, supra*, depends on the relevant facts. If the statute and the classification established comply with the requirement of due process of law and of equal protection of the laws we can then conclude that the constitutional attack has been resisted.

Act No. 37 takes as a basis to establish the exemption the production of thirty-one million gallons. In the report of the Finance Committee of the House of Representatives, it is said that "[s]tudies made have demonstrated that the minimum size recommended for a brewery to be economically feasible is the production of 1.25 million barrels per year (38.75 million gallons), savings being realized in moderate scale until a maximum of 4.5 million barrels (139.5 million galons) per year." We note that the base taken to establish the exemption is 7.75 million gallons less than the recommended minimum for a brewery to subsist without economic difficulties. In order to assure the effectiveness of the measure a figure was taken as a base which is close to that considered the minimum recommended size of a brewery.

In spite of the fact that the combined production of both local breweries for the fiscal year 1976-77 was 12.2 million gallons, we believe that the figure taken as the basis for the exemption is reasonable since it assures the effectiveness of the measure in the long run. After having analyzed the crisis through which our beer industry is passing and after having studies the measure adopted we believe that it is not our province to substitute the figure taken as a basis for establishing the exemption nor the monetary amount of the excise. We also believe that we should not nullify the classification established by the law since we do not consider it arbitrary, capricious, nor unreasonable, since it takes as a basis what is considered as "the minimum recommended size for a brewery to be economically feasible". The annual production and consumption of each of our two breweries show that econmically they cannot subsist without help. The Legislative Assembly had under its consideration documents and information about the present status of the local beer industry. The crisis through which this industry is passing induced the legislator to approve

House Bill 841, the desire being evident to create a protectionist mechanism for the local beer. The intention to help a local industry is not synonymous with discrimination.

A reading of the transcript of the public hearing held, of the survey of the beer industry prepared by the Economic Development Administration, of the Report of the Finance Committee of the House, and the reports of both legislative Houses, demonstrates that the intention was to help the battered local beer industry. But on the other hand the text of the law at no time expressly establishes that the exemption will be granted only to local breweries, but rather establishes a *uniform* tax of $1.60 for every type of beer, local as well as North American or foreign. It establishes a *special exemption* for those breweries whose annual production does not exceed thirty-one million gallons. In spite of the fact that India and Corona meet the requirements to benefit from the exemption said requirements are also met by the Champale and Hofbrau breweries, the first North American and the second European. Presently these four breweries are paying the tax of $1.05 per wine gallon. We should note that the exemption is not unconditional since it is subject to maintenance of the levels of employment established beforehand in the grant of exemption. This requirement guarantees the protection of employment of the workers who labor in this industry helping in this way to combat unemployment. If the level of employment established in the grant of exemption is not complied with, the Director of the Office of Tax Exemption may cancel the exemption if he does not consider the reasons adduced for the reduction valid.

For our final decision about Act No. 37 it is necessary to ask ourselves if for the purposes of achieving a solution to the existing problem the legislator could have opted

for another measure directed to achieving the same purposes. Let us see:

The legislative committees that considered House Bill 841 had under their consideration the report prepared by the Economic Development Administration, to which we have made reference on numerous occasions. This report on pages 12, 13, 14, 57 and 58 proposes a series of alternatives that could remedy the situation of the Puerto Rican beer industry.

The first of the alternatives proposed by the Economic Development Administration would grant governmental subsidies to the cost of production. Among these, the Administration proposed the following: reimbursing 25% of the payroll of production and delivery workers; a reduced marine freight for the importation of necessary raw material (grains, empty cans, caps, labels and others); an exemption from use taxes of 6% on the labels, caps, empty cans, etc., a special rate for the use of electrical energy and the consumption of water; and exemption from personal property taxes on those articles subject to the payment of this tax (cartons, caps, labels, cans). In order for any of these proposals to be effective, according to the belief of the authors of the report, it would have to be converted into a subsidy of permanent character, something which is not desirable for any type of industry. Besides some of them represent a loss for the Government because they would result in not receiving additional collections. Comparing any of these measures with Act No. 37 it is noted that the exemption established by this piece of legislation is in force until the limit is reached or when the level of employment fixed is not met.

Another of the alternatives contained in said report proposes a program of aid and promotion by means of incentives to the two local breweries. These incentives would permit reducing the price of beer produced in the

Island. This measure, according to the opinion of the authors of this report, is not recommended either since it would have to be of a temporary character and the industry needs long term solutions.

The last alternative proposed is that of a differential in excises. Under this alternative three proposals were considered: a tax of $1.05 for the beer packaged, produced or imported in containers of more than five thousand gallons and when packaged, produced or introduced in containers of less than five thousand gallons it would pay the tax of $1.60; approval of a law similar to Act No. 3605 approved by the Congress of the United States; and the measure proposed in Act No. 37.

Act No. 37 establishes a differential in excises on the basis of the previously analyzed formula. The legislator could have selected any of the three options contained in the third alternative. We believe that it was his right to make the selection of the measure that he considered most appropriate while it is our exclusive function to determine the constitutional validity of the law. We are of the opinion that even though any of the other two measures contained in the third alternative would be completely valid, the formula adopted is no less valid, that at the same time gives a just and rational criterion. In addition the purpose of the law is consonant with the police power of the state and its inherent power to impose taxes and establish classes. The classification contained therein was established taking a reasonable base such as the size required for a brewery to be economically viable. Since the measure selected has a real and substantial relationship with the purpose pursued we are forced to decide in favor of the constitutionality of Act. No. 37.

The petitioners in the present case have not shown that the classification made by the legislature does not rest on a reasonable base and that it is essentially arbitrary. Nor

have they shown that there does not exist a rational nexus between the measure and the interest of the State. They merely have limited themselves to alleging that the classification denies them the equal protection of the law and due process of law and that the intention of the Legislative Assembly was to discriminate against them by reason or origin. These allegations are not sufficient to invalidate the law. He who attacks the constitutionality of a law has the burden of proof to show that it does not rest on a reasonable basis, that it is arbitrary, and that it discriminates against them. *Miranda* v. *Secretary of Treasury*, *supra*, 179-180.

The assertion of the petitioners that the statute transgresses the constitutional guarantee that the laws shall not discriminate by reason of origin is groundless and frivolous. This constitutional guarantee, molded in the first section of our Bill of Rights, has the purpose of guaranteeing certain rights to human beings and not to juridical persons.

The substitute proposal of the Committee on the Bill of Rights proposed as a text of the first section of the Bill of Rights that:

> "The dignity of the *human being* is inviolable. All *men* are equal before the law. No discrimination shall be made on account of race, color, sex, birth, *social origin*, political or religious ideas. Both the law and the system of public education shall embody these principles of essential human equality." (Emphasis supplied) 2 Record of Sessions of the Constitutional Convention of Puerto Rico 1101.

Later, Delegate Padron Rivera proposed that "social origin" which appeared in the original text be substituted by "origin or social condition".[46] This was the only amendment made in this section and in that form it was approved.

[46] 2 Record of the Sessions of the Constitutional Convention of Puerto Rico 1381.

It is evident that the term "origin" refers exclusively to natural persons since it is used in a context in which reference is limited to human beings. This is the way in which mister Delegate Gutierrez Franqui interpreted it upon stating that "the word 'persons' includes both natural persons, as well as juridical persons, but not the word 'men'."[47] Delegate Gonzalez Blanes believes that "that against which discrimination ought not to be established is the origin of the individual."[48]

With the preceding analysis as a basis we are of the opinion that Act. No. 37 does not violate the provisions contained in the first and seventh articles of our Bill of Rights and for that reason we sustain its constitutional validity.

While it is true that the petitioners in their attack upon the constitutionality of Act No. 37 do not invoke section 3 of the Federal Relations Act insofar as its prohibition against establishing any discrimination in favor of articles produced or manufactured in Puerto Rico and against similar articles imported from the United States, this Court believes that it is necessary to analyze the amendment to the Alcoholic Beverages Act of Puerto Rico in the light of said section 3. Given the nature of the regulated material, it is necessary to refer also to the Twenty-first Amendment to the North American Constitution.[49]

[47] 3 Record of Sessions of the Constitutional Convention of Puerto Rico 2296. For the purposes of guaranteeing the equal protection of the laws to juridical persons Delegate Gutierrez Franqui suggested that the section read: "All men are equal before the law, and no *person* in Puerto Rico shall be denied the equal protection of the laws." The Bill of Rights of our Constitution guarantees to juridical persons the equal protection of the laws in its seventh section.

[48] Ibid, page 2246.

[49] Section 3 of the Federal Relations Act was one of the federal rights reserved by the petitioners in accordance with the Sixth

By means of the Twenty-first Amendment the states, territories or possessions of the United States are permitted to do that which was barred to them by the Eighteenth.[50] The Twenty-first Amendment provides, in its second section, that:

> "The transportation or importation of alcoholic beverages into any state, territory or possession of the United States, for delivery or use therein, in violation of the laws there in force, is hereby prohibited."

We shall begin the analysis whether the Twenty-first Amendment is applicable to Puerto Rico.

The relationship between Puerto Rico and the United States has been described as one that has no parellel in the history of the nation. That relationship, as has been shown by the course of history, has been changing and evolving, responding in that way to the realities of time. Let us see:

In 1901 the federal Supreme Court in *Downes* v. *Bidwell*, 182 U.S. 244, considered Puerto Rico as a non-incorporated territory.[51] Later, in *Puerto Rico* v. *Shell Co., supra*, it was stated that the purpose of the Foraker Act and the Organic Act was to grant to Puerto Rico powers of local self-determination with autonomy similar to that of the states and the incorporated territories.

The Commonwealth has its genesis in 1950 in Public

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and Seventh paragraphs of the petition. It is necessary to analyze Act No. 37 in this opinion in the light of the Twenty-first Amendment and section 3 of the Federal Relations Act for the purposes of determining which of these two provisions should govern.

[50] The Eighteenth Amendment provides in its first section that: "After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors with in the importation thereof into, or the exportation thereof from the United States and all terriory subject to the jurisdiction thereof for beverages purposes is hereby prohibited."

[51] Because it was a non-incorporated territory only the provisions relating to fundamental rights contained in the Bill of Rights of the North American Constitution were applicable to its citizens.

Law 600.[52] Eighty-first Congress. In *People* v. *Terry Terrol Torres Lozada*, decision December 14, 1977, Associate Justice, Mr. Diaz Cruz stated:

> "The political body that eventually was formed by mutual consent of the Congress and the People of Puerto Rico is not a federated state although it is within the constitutional structures of the United States. Its foundation responded to ethnic, cultural and geographic differences, which cause it to be considered a (*unique*) entity in which with limited incidence, both the laws and the principles of federation operate in a different way than the uniform standard that governs the States of the Union." (citations omitted)

Resolution 22 of the Constitutional Convention, adopted February 4, 1952, as paraphrased at pages 410 and 411 in *R.C.A. Communications, Inc.* v. *Government of the Capital, supra*, states that "in accordance with the mandate received from the people, a Constitution was about to be adopted by virtue of which the Puerto Rican community would be politically organized; that it was necessary to give an appropriate name in both English and Spanish to the body politic this created; that the word "*commonwealth*" in contemporary English usage means a politically organized community in the generic sense, a state, in which the public power resides ultimately in the people, hence a free state, but one which is at the same time linked to a broader political system in a federal or other type of association, and therefore does not have an independent and separate existence; that the word "*commonwealth*" *clearly defined the "status"* of the body politic created under the terms of the compact existing between the people of Puerto Rico and the United States, i.e., a state which

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[52] Entitled an Act Providing for the Organization of a Constitutional Government for the People of Puerto Rico.

is free of superior authority in the management of its own local affairs but which is linked to the United States of America and hence was a part of its political system in a manner compatible with its federal structure; that the translation into Spanish of the English word *"commonwealth"* required a combination of words to express the concepts of state and liberty and association; that expression was *"estado libre asociado"*; that in the case of Puerto Rico the most appropriate translation of *"commonwealth"* was *"estado libre asociado"*, but the literal translation from the Spanish as *"associated free state"* was not proper because *"state"* meant in the United States one of the states of the Union; that the body politic created by the Constitution shall be designated *"The Commonwealth of Puerto Rico"* in English and *"Estado Libre Asociado de Puerto Rico"* in Spanish; and it was provided that the text of that resolution shall be widely distributed, together with the Constitution, for the information of the people of Puerto Rico and the Congress of the United States."

The *sui generis* situation of Puerto Rico within the North American federated system has been recognized in *Mora* v. *Mejias*, 115 F.Supp. 610 (1953); *Wackenhut Corporation* v. *Rodriguez Aponte*, 386 U.S. 268 (1967); *Calero Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 633 (1974); and in *Examining Board of Engineers* v. *Flores de Otero*, 426 U.S. 572 (1976).

Nevertheless, we should point out that by virtue of Public Law 87-189 of August 30, 1961 (75 Stat. 417; 28 U.S.C.A. 1257), it was provided that the final decisions of the Supreme Court of the Commonwealth of Puerto Rico would be reviewed by the Supreme Court of the United States in the same way that it is permitted to finally review decisions of the states of the Union. See, also, Rule 62 of May 30, 1963 of the federal Supreme Court.

On numerous occasions there has been presented to the federal Supreme Court whether the Fifth Amendment or the Fourteenth is applicable to Puerto Rico, but the Supreme Court has consistently resolved that it is not important to decide which of said amendments is applicable. See *Examining Board of Engineers* v. *Flores de Otero, supra.*

Summarizing this special situation Associate Justice, Mr. Negron Garcia states in *People* v. *Terry Terrol Torres Lozada, supra* that:

> "That unparallelled relationship can mean as it does mean in fact, that Puerto Rico has prerogatives and powers that the federal Constitution denies to the states of the Union. By way of example, under section 3 of the Federal Relations Act, Puerto Rico has power to impose taxes on imports, a power that is denied to the states by clause 2 of section 10 of the Constitution. And under sections 9, 28 and 58 of said act not all the federal laws are necessarily applicable to Puerto Rico and specifically the tax laws do not apply, nor those relating to interstate commerce, nor those that conflict with said Federal Relations Act. The states, on the other hand, cannot escape the application of federal laws since these are part of the supreme law of the Nation. *Barton* v. *United States*, 202 U.S. 344, 368 (1906)".

Since 1898 Puerto Rico has been considered as a non-incorporated territory; it was later granted autonomy similar to that of the states and the non-incorporated (sic) territories; in the year 1952 it was converted into a commonwealth; and on occasions it has been treated as a state. It appears clear to this Court that under any of the political formulas enunciated in the Twenty-first Amendment — state, territory or possession — the same is applicable to the Commonwealth of Puerto Rico. Never-

theless, we believe that, due to the provision contained in section 3 of the Federal Relations Act that prevents establishing discrimination in favor of products manufactured or produced in the Island and in view of the fact that this law governs the federal relations existing between Puerto Rico and the United States, it is necessary to refer to this piece of legislation for the purpose of determining whether the Twenty-first Amendment of said section 3 should prevail.

Section 3 of the Federal Relations Act, so far as relevant to the present case, states that:

> "/N/o discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico."

By the Twenty-first Amendment the North American Congress intended to free the states of the traditional restrictions imposed by the interstate commerce clause when regulating the importation of alcoholic beverages destined for use, consumption or distribution within their jurisdiction. *United States* v. *State Tax Commission of Mississippi*, 412 U.S. 363 (1973).

With respect to the Twenty-first Amendment, Senator Blaine, Chairman of the Judiciary Committee that considered the Joint Resolution of the Senate Number 211 proposing the amendment of the Constitution to repeal the Eighteenth Amendment, states the following:

> "Section 1 is a straight, outright repeal of the eighteenth amendment. Section 1, if it is incorporated in the joint resolution, submitted by the Congress, and ratified by the necessary States, will entirely eliminate the eighteenth amendment from the Constitution. I need not discuss that section.
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> Then we have suggested and offered section 2, which provideds as follows:

> The transportation or importation into any *State, Territory* or *possession* of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited.
>
> Mr. President, in agreeing to that section I think the committee was unanimous that the language used would effectuate the purpose that is obviously designed by section 2. It is claimed, however, and I think with some degree of assurance for the future, that Congress now has the power to pass laws to protect the so-called dry states in regulation of interstate commerce over intoxicating liquors. A great many laws on that subject have been enacted.
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> In the case of Clark against Maryland Railway Co. there was a divided opinion. There has been divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.
>
> Mr. President, the pending proposal will give the States that guarantee. *When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restorting to the States, in effect, the right to regulate commerce respecting a single commodity — namely, intoxicating liquor. In other words, the State is not surrendering any power that it possesses, but rather,*

by reason of this provision, in effect acquires powers that it has not at this time.

The committee felt that since the Congress had acted and had definitely legislated upon this question, while that legislation had been sustained by the Supreme Court, yet it was sustained by a divided court, and that we could well afford to guarantee to the so-called dry States the protection designed by section 2.

I am opposed to the dry States interfering with the so-called wet States in connection with this question of intoxicating liquors; and so, by the same token, I am willing to grant to the dry States full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors." Congressional Record, volume 46, part 4, pp. 4140-4141. (Emphasis supplied).

The intention that the states regulate commerce only with respect to alcoholic beverages clearly appears from the report of the Judiciary Committee of the Senate copied above, the regulation of interstate commerce with respect to other articles remaining under the exclusive control of the Congress. There remained in force, besides, clause 2 of section 10 of article I of the Constitution[53] with respect to any product that was not an alcoholic beverage.

In *Craig* v. *Boren, supra,* at page 206, it is said that since 1933, when said amendment was approved, the Supreme Court has reiterated that the amendment creates

[53] It states that:

"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imports, laid by any State on imports and exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress."

an exception to the operation and normal application of the commerce clause. See *Hostetter* v. *Idlewood Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *Carter* v. *Virginia*, 321 U.S. 131, 139-140 (1944); *Finch & Co.* v. *McKittrick*, 305 U.S. 395, 398 (1939).

It it added in *Craig* v. *Boren, supra,* that:

"The Twenty-first Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each provision 'be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.' *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra,* 332; cf. *Department of Revenue* v. *James Beam Distilling Co.*, 377 U.S. 341 (1964); *Collins* v. *Yosemite Park*, 304 U.S. 518 (1938)."

It is decided in *State Board of Equalization of California* v. *Young's Market Corp.*, 299 U.S. 59 (1936) that under the Twenty-first Amendment the states may even prohibit the importation of alcholic beverages that do not comply with the requirements established by local laws. At page 62, it is said:

"The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. *To say that, would involve not a construction of the Amendment, but a rewriting of it.*" (Emphasis supplied).

And at page 63 there appears the following rhetorical question:

"Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations or

discourage importation by laying a heavy impost or channelize desired importations by confining them to a single consignee?"[54]

In *Mahoney* v. *Joseph Triners Corporation*, 304 U.S. 401 (1938) it is decided on the basis of *Young's Market, supra* that a class recognized by the Twenty-first Amendment cannot be prohibited by the Fourteenth.

The statute attacked in *Young's Market, supra*, that imposed the possession of a license as a requirement in order to be able to import beer, as well that attacked in *Mahoney, supra*, that prohibited importation of intoxicating beverages that contained more than 25% in alcohol if they were not brands registered in the patent office, were declared constitutional because they did not violate the equal protection of the laws clause. See *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U.S. 391 (1939) and *Finch* v. *McKittrick, supra*.

In spite of this broad judicial interpretation of the amendment to which we refer, the interpretation has been restricted on occasion in trying to harmonize its provisions with the commerce clause. In *Department of Revenue* v. *Beam Distilling Co.*, 377 U.S. 341 (1964), citing *Low* v. *Austin*, 13 Wall 29, the federal Supreme Court states that "The goods imported do not loose their character as imports, . . . until they have passed from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition." It is also said that:

> "We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution,

[54] See *Parks* v. *Allen*, 426 F.2d 610 (1976); *Hornsby* v. *Allens*, 326 F.2d 605 (1964); *Avion Export Co.* v. *Cook*, 318 F.Supp. 1076 (1970).

> use or consumption within its borders. There can surely be no doubt, either, of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use or consumption of intoxicants within her territory after they have been imported. All we decide today is that because of the explicit and precise words of the Export-Import Clause of the Constitution, Kentucky may not lay this impost of these imports from abroad."

The dissenting opinion of Judge Black, in this case, who was joined by Judge Goldberg, severely criticized this deviation from the purposes of the amendment. He invokes prior decisions of the Court in which it was recognized that the power of the state to regulate this material was not limited by the commerce clause nor by the equal protection of the laws clause. He is of the opinion that the importation and exportation clause limit the power of the state even less.

The fifth clause of section 9 of article I of the North American Constitution establishes as a prohibition that "no tax or duty shall be laid on articles exported from any state."

Even though this clause does not extend to Puerto Rico, compliance with it is guaranteed by section 3 of the federal Relations Act where it is provided that "[n]o export duties shall be levied or collected on exports from Puerto Rico."

On the other hand, said article of the North American Constitution in clause 2 of section 10 states that "[n]o state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws . . ." Contrary to this provision, in section 3 of the Federal Relations Act it is established that "the internal revenue tax levied by the Legislature of Puerto Rico, in

pursuance of the authority granted by this act on articles, goods, wares or merchandise may be levied and collected as such Legislature may direct, on the articles subject to the said tax, as soon as the same are manufactured, sold, used, or brought into the Island . . ."[55]

The authority granted by the Congress by means of the Butler amendment,[56] to the people of Puerto Rico to levy a local tax on articles imported from the United States or from foreign countries as soon as they are introduced, (subject to the sole condition of uniformity) is independent of the federal customs laws and regulations. This fiscal power also is independent of the original package doctrine. *Texas Co. (P.R.) Inc.* v. *Tax Court of Puerto Rico,* 82 P.R.R. 129, 141 (1961).

In *Texas Co. (P.R.) Inc.* v. *Tax Court of Puerto Rico, supra,* at pages 142 and 143 the ruling of the federal *Supreme Court* in *West India Oil Co.* v. *Domenech,* 311 U.S. 20, 27-28 (1948) is stated:

> "The plain purport of the words of this proviso is that any tax authorized by the Organic Act with respect to articles of domestic production may likewise be levied with respect to imported articles 'as soon as . . . [they] . . . are manufactured, sold, used, or brought into the island' provided only that there be no tax discrimination between articles brought from

[55] In spite of the fact that by virtue of section 3 of the Organic Act of 1917 the Congress of the United States granted to the People of Puerto Rico legislative power to levy and collect internal revenue taxes, the imposition and collection of an excise as soon as the taxable article had been introduced or imported into the Island was not made possible on that date. On March 4, 1927, by means of an amendment to the Organic Act of 1917 the Congress empowered Puerto Rico to levy taxes on products that were imported into our jurisdiction. *Texas Company (P.R.) Inc.* v. *Tax Court of Puerto Rico,* 82 P.R.R. 129, 137 (1961).

[56] It amended the Organic Act of 1917 on March 4, 1927.

> the United States and foreign countries and domestic articles. The amendment seems to have been occasioned by doubts which had arisen whether merchandise brought to the Island from the United States was subject to local taxation, while in the original package and also whether the merchandise has, while in the control of the customs authorities, the same status as respects local taxation as goods similarly controlled which have been imported from foreign countries and whether the power of the insular legislature to tax imports from foreign countries was any greater than that of the states which are forbidden, by Clause 2 of Section 10 of Art. I of the Constitution, to tax imports and exports without the consent of Congress. S. Rept. No. 1011, 69th Cong., 1st Sess., p. 2. Cf. *Sonneborn Bros.* v. *Cureton,* 262 U.S. 506, with *Baldwin* v. *Seelig,* 294 U.S. 511, 526
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> . . . . . "
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> "Moreover practical difficulties appear to have been experienced in levying insular taxes upon goods on their arrival from the United States and while in the custody or control of postal or customs officers, due to the fact that the local tax while in its pactical effect a customs duty was not collected by postal or customs officials. S. Rept. No. 1011, 69th Cong., 1st Sess. The doubts and the difficulty were removed by the amendment to section 3, giving the Congressional consent that articles should be subject to the taxing jurisdiction of the Puerto Rico legislature as soon as brought into the Island whether from the United States or from foreign countries, and directing that the United States customs officials and postal service should aid local officers in the collection of the tax.

> The effect of the broad language of the amendment was not only to subject to taxation all imported goods, whether from the United States or foreign countries, when brought into the Island in the original package, but to neutralize the regulatory effect of the customs laws and regulations in so far as they protected articles from local taxation after their arrival. Merchandise in the original package was thus subjected to tax when brought into the Island without regard to customs regulations. It would seem plain that other merchandise not in the original package was left in no more favorable situation and in the face of the broad and unambiguous language of the statute we cannot say that the one more than the other, is immune from local taxation . . .".

The power of the Legislative Assembly of Puerto Rico to levy taxes on every type of articles, wares, or merchandise is evident. The taxes will be levied and collected, as the Legislature may provide, once the articles have been manufactured, sold, used or imported into the Island.

The authority of our Legislative Assembly to levy taxes is not limited by the restriction of clause 2 of section 10 of article I of the North American Constitution. Our Legislature is permitted that which is prohibited to the state legislatures: the power to levy taxes on imports. Its power to levy taxes on articles that are imported into our jurisdiction is plenary.

In accordance with articles 2 and 4 of Public Law 600 some provisions of the Act to Provide a Civil Government for Puerto Rico and other Purposes (Organic Act) approved March 2, 1917, remained in force. These provisions of the Organic Act of 1917 that remained in force constitute the Federal Relations Act with Puerto Rico. Thus, the Federal Relations Act now covers the following articles of

the Organic Act of 1917, as amended: 1, 2 (part) 3, 5, 5b (doubtful), 6, 7, 8, 9, 10, 11, 36, 37 (part), 38 (part), 41, 42, 44, 45, 47, 48, 54 and 58.

Section 3 of the Federal Relations Act dates, therefore, from 1917, while the Twenty-first Amendment of the North American Constitution was approved by the Congress in 1933 and promulgated by the Secretary of State in 1934. Although in 1950 the people of Puerto Rico accepted in a general referendum the articles of the Organic Act of 1917, that remained in force, said articles being known since then as the Federal Relations Act, this fact does not affect our determination in any way since the Legislative Assembly possesses plenary powers to levy taxes on articles, wares or merchandise once the same have been manufactured, sold, used, or imported into this jurisdiction. The power of the Commonwealth of Puerto Rico to levy taxes is unquestionable.[57] Nevertheless, by virtue of the cited clause of section 3 of the Federal Relations Act, the Legislative Assembly cannot discriminate in favor of articles produced or manufactured in the Island and discriminate against similar products imported from the United States. We believe that this clause refers exclusively to those articles or merchandise that are not alcoholic beverages since by virtue of the Twenty-first Amendment the Legislature can regulate free of restrictions the area of intoxicating beverages.

The Court of Appeals for the Circuit of Boston in *San Juan Trading Co.* v. *Sancho*, 114 F.2d 969 (1940), affirmed the decision of the District Court of the United States for Puerto Rico. The District Court believed that the distinction between square matches and round matches was unreasonable since there did not exist a substantial relation-

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[57] See *WAPA TV Broadcasting Corporation* v. *Secretary of Treasury*, decided March 9, 1977.

ship between the classification and the purpose of the tax statute and therefore it violated the Fourteenth Amendment and section 3 of the Organic Act. The defendant, the Treasurer of Puerto Rico, supports his contention about the constitutionality of the statute under attack citing the cases of *Mahoney* v. *Triner Corp., supra,* and *State Board* v. *Young's Market Co., supra.* The Judge of the Court of Appeals that signed the opinion believed that:

> "The cases cited by the defendant do not uphold his contention that it is permissible to discriminate against nondomenstic products. *Mahoney* v. *Triner Corp.,* 1938, 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424, and *State Board* v. *Young's Market Co.,* 1936, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed 38, are decided exclusively on the ground that discrimination as to liquor is expressly authorized by the XXI Amendment to the United States. (sic). The peculiar legislative power to regulate the liquor business is sufficient also to differentiate *Sancho* v. *Bacardi Corporation of America,* 1 Cir., 1940, 109 F. 2d 57, from the case before us, as well as the fact that the classification therein was found to be reasonable in order to protect the renascent liquor industry of the Island from competition by foreign capital, so as to avoid the increase and growth of financial absenteeism. That case is by no means authority for the proposition that tax differentials between likes or similar articles of Puerto Rican and non-Puerto Rican manufacture may be made solely for the purpose of promoting local industry."

The Court of Appeals refused to apply these two cases because there were involved in them statutes concerning intoxicating beverages subject to special regulation by the Twenty-first Amendment.

On the basis of the Congressional intent to leave in the hands of the states, territories or possessions the exclusive regulation of intoxicating beverages and of the inherent power to levy taxes of our Legislative Assembly, we are of the opinion that the Twenty-first Amendment should prevail over the clause of section 3 of the Federal Relations Act discussed above. Said Amendment, Twenty-first, pursues the objective of granting to the states, territories or possessions full authority, free of limitations to approve laws that regulate alcoholic beverages.

The said amendment being extensive to it, Puerto Rico exercises the power of regulating the area of intoxicating beverages free of any restriction. The limitation of the Federal Relations Act extends only to those articles or merchandise that are not intoxicating beverages.[58]

The constitutional validity of Act. No. 37 is clear under the provisions of the clauses of due process of law and of equal protection of the laws of our Constitution as well as under the Twenty-first Amendment of the North American Constitution.

Finally, even though with the preceding determination sustaining the constitutional validity of Act No. 37 any pronouncements with respect to the application for an injunction becomes academic, we believe it necessary to make certain notes with respect to said application.

The seventh section of article 678 of the Code of Civil Procedure (32 L.P.R.A. sec. 3524) establishes that no injunction may be issued to prohibt the collection of a tax established by the laws of the United States or Puerto Rico. But on the other hand our Supreme Court has limited this

[58] It should be noted that in Puerto Rico the excise on beer is paid when the merchandise arrives at the dock or, later, as the packages of beer are taken out of the bonded warehouses. The excise falls on the beer that is going to be consumed or used in our jurisdiction.

remedy to those cases in which it clearly appears that the tax is illegal, that the taxpayer lacks an adequate remedy at law, that the tax would cause irreparable damages or would give rise to a multiplicity of suits. *Cafeteros de Puerto Rico* v. *Treasurer*, 74 P.R.R. 704 (1953); *Cooperativa Cosecheros de Cafe* v. *Treasurer*, 69 P.R.R. 210, 214 (1948); *Fernandez* v. *Buscaglia, Treasurer*, 60 P.R.R. 582, 584 (1942); *Los Diablos* v. *Treasurer*, 54 P.R.R. 626 (1939); *Plaza Provision Co., Inc.* v. *Benitez*, 51 P.R.R. 636, 640-641 (1937); *The Texas Co.* v. *Treasurer*, 50 P.R.R. 415, 434-435 (1936); *Durlach Bros., Inc.* v. *Treasurer*, 47 P.R.R. 617, 622 (1934).

Besides, the petitioners had at their disposal the local forum since Act No. 12 of August 8, 1974, that amends article 678 of the Code of Civil Procedure, *supra*, permits the issuance of an injunction in those cases in which a violation of constitutional rights is alleged.[59]

As specific facts that show that they have been caused irreparable damages the petitioners allege that: (a) the tax differential of 55¢ will increase the price of imported beer at the level of the consumer at least 10¢ on all types of containers; (b) of the 46.8 million gallons consumed in Puerto Rico during the fiscal year 1977-78, 12 million gallons were produced locally; (c) the report of the Finance Committee of the House of Representatives shows that the participation of the beer produced by enterprises that manufacture more than 31 million gallons will be reduced to 60% of the market as a result of the approval of Act No. 37; (d) the petitioners will have a loss of $25.4 million per year in the gross value in the market of imported beer; (e) on the basis of Table 21 of the report of the Economic Development Administration the petitioners estimate that Act No. 37 will cause petitioners a loss of 6.6 million gallons or 3.5 million of cases of 10 ounces, that at the price of $7.05 amounts to a loss of $24.6 million in the gross value of sales in the Puerto Rican market.

[59] For the interpretation of this law, see *Pierson Muller* v. *Feijoo*, decided April 12, 1978, *Febres de Miranda* v. *Feijoo*, decided January 12, 1978, and *Otero Martinez* v. *Romero Barcelo*, decided November 30, 1977.

As already stated, the petitioners did not present any proof to sustain the preceding averments. For that reason we denied the preliminary injunction since they did not comply with the requirements established in *Puerto Rico Telephone Company* v. *Superior Court*, *supra*, and *Puerto Rico Ports Authority* v. *Superior Court*, *supra*.

We are forced to conclude then that the permanent injunction is not in order since it was subject to a prior determination concerning the constitutionality of Act No. 37. Having decided the constitutionality of the law a further discussion about the merits of the issuance of the writ is unnecessary.

JUDGMENT

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Court grants judgment with the following pronouncements:

1. Act No. 37 of July 13, 1978 is declared constitutional and valid.

2. The complaint is dismissed and the case is closed, without special taxation of costs nor attorneys' fees.

REGISTER AND NOTIFY:

In San Juan, Puerto Rico, December 12, 1978.

/signed/ C. S. Zayas
CARMEN SONIA ZAYAS
Superior Judge

CERTIFIED:

To be a correct translation submitted by the interested party.

Official Court Interpreter and Translator
United States District Court
For The District of Puerto Rico

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 78-1393

UNITED STATES BREWERS ASSOCIATION, INC., et al.,

PLAINTIFFS, APPELLANTS,

v.

JULIO CESAR PEREZ, ETC., et al.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. JUAN R. TORRUELLA, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

Stanley L. Feldstein, with whom *Gustavo A. Gelpi*, *Feldstein, Gelpi, Hernandez & Castillo*, and *Federico A. Cordero*, were on brief, for appellants.

Federico Cedo Alzamora, Assistant Solicitor General, Department of Justice, with whom *Hector A. Colon Cruz*, Solicitor General, was on brief, for appellees.

February 21, 1979

COFFIN, *Chief Judge*. This is an action for declaratory and injunctive relief, brought by five United States mainland beer producers and a trade association representing the producers of 95 per cent of the beer sold in the United States, to restrain Puerto Rican officials from collecting an increase in the internal revenue tax on beer imposed by Act 37 of July 13, 1978. In the alternative, as set forth in the amended complaint, the plaintiffs sought to enjoin defendants from applying that Act's

exemption of "beer produced by persons whose total production during its most recent year has not exceeded thirty-one million (31,000,000) wine gallons". Plaintiff-appellants contend that the law was intended to and does protect, via its exemption, two local beer producers, thus curtailing competition with beer produced outside of Puerto Rico in violation of 48 U.S.C. § 741(a). That provision prohibits Puerto Rico from discriminating by way of its taxing power between articles imported from the United States and other foreign countries and similar articles manufactured in Puerto Rico. Various constitutional infringements are alleged as well.

While describing the taxing statute as *prima facie* in violation of 48 U.S.C. § 741(a), the district court held that the suit was controlled by the Butler Act, 48 U.S.C. § 872, which provides that:

> "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico."

Although the Butler Act constitutes a flat prohibition of such suits, the court adopted a more flexible approach akin to 28 U.S.C. § 1341[1] and held that "the Butler Act cannot preclude the enjoinment of a Commonwealth's tax where a clear violation of 48 U.S.C. § 741(a) is established, and where there exists no plain, speedy and efficient remedy in the local forums."[2] Expressing uncertainty about the availability and

[1] 28 U.S.C. § 1341, also a tax injunction act but applicable to the states rather than the Commonwealth of Puerto Rico, provides that:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain speedy and efficient remedy may be had in the courts of such State."

[2] The district court's reluctance to read the Butler Act as an absolute ban, construing it instead "in a manner consistent with general equitable principles" was generally in accord with the

adequacy of local remedies, the court retained jurisdiction but directed the plaintiffs to seek "a decision of the Commonwealth Courts as to the issues raised in this case, and particularly, concerning the existence of an adequate right of action." Plaintiffs did so, and the Superior Court of Puerto Rico has issued a ruling, declaring Act 37 of July 13, 1978 constitutional and otherwise valid and dismissing the complaint. *United States Brewers Association* v. *Perez*, Civ. No. PE-78-1137 (Dec. 12, 1978). At oral argument appellants, appropriately, conceded that the availability of a local remedy thus has been demonstrated. Therefore, the only issue before us on appeal is whether the Butler Act should be applied to this suit to bar jurisdiction.

Appellants argue that neither the language nor the legislative history of the Butler Act supports its application to the relief sought in their amended complaint, namely, that the court declare invalid those portions of the Act exempting smaller producers from the heightened tax and enjoin defendants from collecting a lower tax from local producers than that collected from beer producing plaintiffs outside of Puerto Rico. They maintain that the concern which prompted passage of the Butler Act and 28 U.S.C. § 1341, that the fiscal operations of a state would be crippled if a taxpayer could refuse to pay his taxes and then commence federal litigation, *see Tully* v. *Griffin*, 429 U.S. 68, 73 (1976); *Matthews* v. *Rodgers*, 284 U.S. 521, 525-26 (1932); *United States v. State Tax Commission*, 481 F.2d 963, 973 (1st Cir. 1973); *Sancho* v. *National City Bank of New York*, 112 F.2d 998, 998-99 (1st Cir. 1940), is not implicated where, as here, a party asks that a state be required to equalize its taxing scheme by collecting a greater rather than a lesser amount of taxes than it has

limited case law applying that Act. *See Paul Smith Construction Co.* v. *Buscaglia*, 140 F.2d 900, 901 (1st Cir. 1944); *Sancho* v. *National City Bank of New York*, 112 F.d 998, 1003 (1st Cir. 1940); *Everlasting Development Corp.* v. *Sol Luis Descartes*, 95 F. Supp. 954, 958 (D. P.R. 1951), *aff'd on other grounds*, 192 F.2d 1 (1st Cir. 1951), *cert. denied*, 342 U.S. 954 (1952); *Boyce* v. *Buscaglia*, 77 F. Supp. 753, 756-57 (D. P.R. 1948).

legislated. In sum, they conclude that the district court erred by failing to distinguish between restraining payment of a tax and restraining application of an exemption from a tax.

We disagree. Contrary to appellants' narrow view of the statute, it might well be proper to apply the Butler Act beyond its literal terms to encompass their suit to enjoin enforcement of a tax exemption. We base our decision instead, however, on the considerations which underlie 28 U.S.C. § 1341 and the Butler Act, *see Great Lakes* v. *Huffman*, 319 U.S. 293, 299 (1943), "equity practice, . . . principles of federalism . . . and the imperative need of a State to administer its own fiscal operations." *Tully* v. *Griffin*, 429 U.S. 68, 73 (1976); *see Paul Smith Construction* v. *Buscaglia*, 140 F.2d 900, 901-02 (1st Cir. 1944).

Those considerations would be ill served by the technical distinction urged by appellants in this case. The requested injunction, restraining the Commonwealth from collecting a lower tax from those exempted from Act 37, could be framed in two ways, either by ordering the state not to collect the tax increase or by requiring the state to levy the tax hike on exempt as well as nonexempt parties. As appellants apparently recognized when they amended their complaint, the first clearly constitutes relief proscribed by the Butler Act, as it would "restrain the assessment or collection of any tax", 48 U.S.C. § 872. The second, we believe, would be no less improper. Appellants are willing to pay the increased tax, but only on the condition that the Commonwealth revoke the exemption and assess an equal tax on smaller producers. We fail to see how that position and federal litigation aimed at validating it do not disrupt the orderly collection and administration of state taxes. Inequalities in a taxing system, endemic to the levy of any tax or exemption therefrom, simply may not be remedied in this fashion.

Furthermore, an order of a federal court requiring Commonwealth officials to collect taxes which its legislature has not seen fit to impose on its citizens strikes us as a particularly

inappropriate involvement in a state's management of its fiscal operations. *See also Cornelius* v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1193-94 (D. Conn. 1974). This is neither a case in which a court orders reluctant state officials to collect taxes authorized by the citizens of the state, *see Hargrave* v. *McKinney*, 413 F.2d 320, 326 (5th Cir. 1969), nor one in which officials have failed to perform their "special responsibility" to levy taxes for a crucial public purpose and consequently have violated federal constitutional rights, *see Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 232-33 (1964). As appellees point out, the invalidation of the exemption in Act 37 is an awkward and heavy-handed remedy, producing a broad taxing statute for which the Commonwealth may have believed there was no need or which was actually detrimental to its domestic policy. Sound equity practice and a concern for interests of federalism thus bar both the injunctive and declaratory relief sought by appellants. *See Great Lakes* v. *Huffman*, *supra*.

This interference is needless as well, for "the asserted federal right may be preserved without it", *Matthews* v. *Rodgers*, *supra*, 284 U.S. at 525-26. Appellants' contention that Act 37 contravenes 48 U.S.C. § 741(a) has been heard and rejected in the Superior Court of Puerto Rico. The next step for appellants is an appeal to the Supreme Court of Puerto Rico and then, if necessary, to seek review in the United States Supreme Court pursuant to 28 U.S.C. § 1257.

The district court retained jurisdiction over this case while the plaintiff-appellants sought, pursuant to its order, a decision in the Commonwealth courts. As the appellants have done so and there no longer exists any uncertainty about the willingness of those courts to address the merits of the claims, the case is remanded to the district court so that it may dismiss the case for want of jurisdiction.

It is so ordered.

APPENDIX F

(Text as Finally Passed By the House of Representatives
(June 20, 1978)

COMMONWEALTH OF PUERTO RICO

8th Legislative Assembly 2nd Ordinary Session

HOUSE OF REPRESENTATIVES

House Bill 841

May 24, 1978

Presented by representatives Viera Martinez, Salichs, Granados Navedo, madame Monrouzeau Martinez, messrs. Ayala Del Valle, Misla Aldarondo, Barriera Vazquez, Martinez Colon, Rivera Morales, Batista-Montanez, Segardia Sanchez, Valentin Acevedo, Torres Quiles, Fonseca Jimenez, Cruz Ortiz, Soldevila, Hernandez Rodriguez, Navarro Alicea, Estevez-Datis, Collazo, Colon Lugo, DeJesus, Dones-Rosario, Esteves Lopez, Iglesias Rodriguez, Marrero Hueca, Molina Vazquez, Morales Garcia, Rivera Quinones, Robles Albarran, Rojas Reyes and Rosario Baez.

Referred to the Finance Committee

LAW

TO AMEND SUBSECTIONS (b) AND (c) of SECTION 4 of ARTICLE 6, and to add ARTICLE 21-A to LAW NO. 143 of June 30, 1969, As Amended, Known As The "ALCOHOLIC BEVERAGES ACT OF PUERTO RICO".

BE IT DECREED BY THE LEGISLATIVE ASSEMBLY OF PUERTO RICO:

Article 1. Subsections (b) and (c) of Section 4 of Article 6 are amended and Article 21-A is added to Law No. 143, promulgated on June 30, 1969, as amended, so as to read as follows:

"Article 6.–

There shall be imposed, collected and paid once on the following products that are held in deposit or that have been or may be in the future distilled, rectified, produced, manufactured, imported or introduced into Puerto Rico, an internal revenue tax at the following rates:

1.—(a) .....

4.—(a) .....

(b) On all beer, lager beer, ale, porter, malt extract and other analogous fermented or non-fermented products, whose alcoholic content exceeds one and one-half percent (1½%) by volume, there shall be collected a tax of one dollar sixty cents ($1.60) for each wine gallon and a proportional tax at the same rate on each fraction of wine gallon, except as provided in Article 21-A of this law.

(c) On all beer, lager beer, ale, porter, malt extract and other analogous fermented or non-fermented products whose alcoholic content exceeds one and one-half percent (1½%) by volume and is sold in containers of five (5) or more wine gallons, there shall be collected a tax of one dollar sixty cents ($1.60) for each wine gallon and a proportional tax at the same rate on each fraction of wine gallon, except as provided in Article 21-A of this law.

Article 21-A.—Special Exemption.

Instead of the tax provided by subsections (b) and (c) of Section 4 or Article 6 of this law on all beer, lager beer, ale, porter, malt extract and other analogous fermented and non-fermented products whose alcoholic content exceeds one and one-half (1½) percent of volume to which subsections (b) and (c) of said Article refer, that are produced or manufactured by persons whose total production, if any, of said products during the most recent taxable year has not exceeded thirty one million (31,000,000) wine gallons, there shall be collected a tax of one dollar

five cents ($1.05) per wine gallon and a proportional tax at the same rate on each fraction of wine gallon. Subject to the provisions of paragraphs (A) to (E), the benefits of this Article shall be granted for any taxable year of a person following that year in which his total production of the products described in this Article, if any, have not exceeded thirty-one million (31,000,000) wine gallons.

(A) *Rules for Claiming Exemption.*

Every person that wishes to claim the benefits of this article must file an application for exemption with the Director of the Office of Industrial Tax Exemption.

The Director may require, by regulation, all information that he deems necessary and may, likewise, include in the grant of exemption those terms and conditions that, in his judgment, promote the economic welfare of all sectors of the industry.

The exemption will become effective immediately upon the filing of the application and will continue in force until denied by the Director. The grantee must maintain the level of employment fixed in the grant of exemption, taking as a base the level of employment prevailing on May 31, 1978, in the applicable cases; otherwise [he or it] will be subject to the following alternatives:

(a) In case the grantee finds it necessary to maintain a level of employment lower that the level required in the exemption, but not less that ninety percent (90%) thereof, [he or it] is required to notify the Director of the Office of Tax Exemption (sic) of this fact, stating the reasons that justify the reduction.

(b) In case the grantee finds it necessary to reduce the level of employment to a number less that ninety percent (90%) of the level required in the exemption, [he or it] must file with the Director of the Office of Tax Exemption (sic) an application justifying the reduction, by means of verified petition with copy to the Secretary of the Treasury and the Secretary of Labor.

The Director shall take into consideration the grounds adduced by the grantee to justify the need for reduction of employment, but not limited to strike, war, governmental action, natural causes or any other reasonable cause that is beyond the control of the grantee and shall make his decision in writing within the thirty (30) days following the date of receipt and acceptance of the petition.

The Director may cancel the exemption in those cases in which the petitioner does not comply with the corresponding alternative or may reduce the rate of exemption in proportion to the relationship that exists between the number of reduced employment and the level of employment fixed in the grant.

Nothing herein provided shall be interpreted as altering or modifying the provisions of any collective bargaining agreement between any grantee and a labor organization.

(B) *Rules for Determining Total Production*

In the case of persons who individually or collectively, directly or indirectly control enterprises that produce one or more classes of the products described in this article, under one or more brands, the total annual production of all said classes and brands, will be considered to determine if said persons can claim the benefits of this article. Provided, that in determining the total production of the products described in this article by any person in one year, there shall be taken into account not only the direct production of said person but any indirect production of said person performed by other persons under franchises, licenses, rights or similar contracts.

(C) *Rule for Cases of Controlled Groups.*

In the case of controlled groups of corporations or partnerships, the total of thirty one million (31,000,000) wine gallons indicated in this article shall apply to each controlled group, except if said production is effected in

Puerto Rico, in which case there shall exist a right to the exemption granted in this article. As used in this article, the term "controlled group of corporations or partnerships" shall have the same meaning that said term has in Section 28 of the Income Tax Act of 1954, as amended.

(D) *Violations of this Article.*

Any person that improperly accepts the benefits of this article shall be subject to the sanctions and penalties provided in this law.

(E) *Administration and Regulations.*

1. The Director of the Office of Industrial Tax Exemption, created by Section 10(a) of Law No. 26 of June 2, 1978, is authorized to grant the exemption provided in Article 21-A of this law. The decisions of the Director shall be final, unless otherwise provided by regulation.

2. The Director is empowered to revoke the exemption granted when the Secretary of Treasury determines, by investigation, that the grantee has not complied with the requirements and conditions of same.

3. The Director of the Office of Industrial Tax Exemption is authorized to promulgate such rules and regulations as may be necessary to effectuate this article and said regulations, when so promulgated, shall have the force of law."

Article 2. This law shall be effective immediately after its approval.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 78-1370

UNITED STATES BREWERS ASSOCIATION, INC.; ANHEUSER-BUSCH, INC.; CARLING NATIONAL BREWERIES, INC.; MILLER'S BREWING CO.; JOS. SCHLITZ BREWING CO.; THE F. & M. SCHAEFER BREWING CO., INC.

Plaintiffs

vs.

JULIO CESAR PEREZ, AS SECRETARY OF THE COMMONWEALTH OF PUERTO RICO'S DEPARTMENT OF THE TREASURY; AND LUIS DEYNES FEIJOO, AS DIRECTOR OF THE BUREAU OF ALCOHOLIC BEVERAGES OF THE TREASURY DEPARTMENT

Defendants

AMENDED COMPLAINT

To the Honorable Court:

Come now plaintiffs, and complaining of the defendants respectfully allege and pray:

1. This is an action to redress the deprivation under color of law of the Commonwealth of Puerto Rico of rights secured to plaintiffs by the Fifth and Fourteenth Amendments of the Constitution of the United States of America and the applicable provisions of the Federal Relations Act, especially 48 USC, 737 and 741(a).

2. Plaintiff, United States Brewers Association, Inc., is a trade association incorporated under the laws of New York and represents the manufacturers of 95% of the beer sold in

the U.S.A.; plaintiff, Anheuser-Busch, Inc., is a corporation duly organized and existing under the laws of, and with its principal place of doing business in Missouri; plaintiff, Carling National Breweries, Inc., is a corporation duly organized and existing under the laws of Virginia, with its principal place of doing business in Maryland; plaintiff, Miller's Brewing Co., is a corporation duly organized and existing under the laws of, and with its principal place of doing business in Wisconsin; plaintiff, Jos. Schlitz Brewing Co., is a corporation duly organized and existing under the laws of, and with its principal place of doing business in Wisconsin; plaintiff, The F. & M. Schaefer Brewing Co., is a corporation duly organized and existing under the laws of, and with its principal place of doing business in New York.

3. Annual beer production of each beer-manufacturing plaintiff is well in excess of 31 million wine gallons.

4. With the exception of the United States Brewers Association, Inc., plaintiffs are in the business of manufacturing beer for distribution and sale in interstate and foreign commerce, including Puerto Rico.

5. Defendant Julio Cesar Perez is the Secretary of the Commonwealth's Treasury Department and as such is empowered by the Alcoholic Beverages Act of Puerto Rico, Act 143 of June 30, 1969, as amended, to administer and to put in effect its provisions; and Luis Deynes Feijoo is the Director of the Bureau of Alcoholic Beverages of the Treasury Department, to which the Secretary of the Treasury, under the terms of 13 LPRA 6121, delegates the administration of Act 143 of June 30, 1969, as amended (hereinafter referred to as "the Act").

6. Jurisdiction is conferred on this Court by 28 USC 1343 and 1331. This Court also has diversity jurisdiction based on the citizenship of the parties as previously set forth and because the amount in controversy exceeds, exclusive of interest and costs, the sum of TEN THOUSAND DOLLARS ($10,000.00) for each plaintiff. This action arises under Article I, Section 8, and Article III, Section 2, Clause 1 of the U.S.

Constitution; the Fifth and Fourteenth Amendments to the U.S. Constitution; Article IV, Section 3, Clause 2, the Territorial Clause of the U.S. Constitution; the Supremacy Clause, Article VI, Clause 2 of the U.S. Constitution, 48 USC, 737 and 741(a), Civil Rights Act 42 USC 1983; the Federal Declaratory Judgment Act, (28 USC 2201, 2202); and Rule 65 of the Federal Rules of Civil Procedure.

7. Under the terms of Article VI, Clause 2 of the U.S. Constitution, that Constitution, the Laws of the United States, and all treaties made under the authority of the U.S.A. are the Supreme Law of the Land, and under the terms of Article IV, Section 3, Clause 2 of the U.S. Constitution, the U.S. Congress has the power to make all needful Rules and Regulations with respect to U.S. territories, including Puerto Rico.

8. Under the terms of Public Law 600 of July 3, 1950, 64 Stat. 314, 1 LPRA pages 136-138, the people of Puerto Rico were authorized to ". . .organize a government pursuant to a constitution of their own adoption." Under the terms of Section 4 of Public Law 600, and with the exceptions pointed out in Section 5 of the Act, the Organic Act of March 2, 1917—"An Act to provide a civil government for Puerto Rico . . .", popularly known as the Jones Act—was ". . .continued in force and effect and may hereafter be cited as the 'Puerto Rican Federal Relations Act'."

9. Section 3 of the Organic Act of March 2, 1917—48 USC, Section 741(a)—in what is relevant to the present controversy states that, in regard to internal-revenue taxes levied by the Legislature of Puerto Rico,". . . no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico."

10. Under the terms of Section 2 of Public Law 600 of July 3, 1950, the provisions of 48 USC 737 and 741(a)—were accepted by the people of Puerto Rico in an island-wide referendum.

11. Act 37 of July 13, 1978 amended subsections 4(b) and (c) of Section 6 of Act 143 of June 30, 1969, as amended, and added a new provision, Section 21-A, to that Act. Act 37 increases the internal revenue tax on beer produced by breweries whose annual production is 31 million wine gallons, or more, from $1.05 up to $1.60 per wine gallon or fraction of wine gallon; and establishes a procedure to exempt from the tax increase the beer ". . . produced or manufactured by persons whose total production . . . during its most recent tax year has not exceeded thirty one million (31,000,000) wine gallons. . .". The obvious intent and necessary effect of Act 37 is to discriminate in favor of beer manufactured in Puerto Rico by establishing a classification designed to discriminate against beer manufactured by the beer-producing plaintiffs outside of Puerto Rico and thereby protect local production against the competition of the beer produced outside Puerto Rico by the beer-producing plaintiffs. While the beer-producing plaintiffs would be subject to the $1.60 tax, the two locally produced beers—India and Corona—qualify for the lower $1.05 per wine gallon tax.

12. Under the terms of Section 8 of Article I of the U.S. Constitution; Article IV, Section 3, Clause 2; and Article VI, Clause 2 of the U.S. Constitution; the Fifth and Fourteenth Amendments to the U.S. Constitution; and under the terms of 42 USC 1983 and 48. USC, 737, and 741(a)—which are superior and supreme to Puerto Rico's laws upon the subject—the Legislative Assembly of Puerto Rico cannot use its power to levy internal-revenue taxes to discriminate against beer produced by the beer-producing plaintiffs in the United States and in favor of beer produced in Puerto Rico. Act 37 is unconstitutional in that it violates Article I, Section 8 of the Constitution of the United States of America by using the taxing power to effect an invidious discrimination; it violates the Fifth and Fourteenth Amendments of the Constitution of the United States of America in that it denies plaintiffs due process and the equal protection of the laws; it violates the Federal

Relations Act, particularly 48 USC, 737 and 741(a), in that it discriminates between articles imported from the United States or foreign countries and similar articles manufactured in Puerto Rico.

13. The defendants, acting jointly and in concert, are empowered to and will enforce against the beer-manufacturing plaintiffs the provisions of Act 37, and unless defendants are restrained from enforcing and levying the increased taxes provided by Act 37, plaintiffs will suffer great and irreparable injury in that they will be placed at a competitive economic disadvantage vis-a-vis the local beer producers with the consequential loss of the Puerto Rican beer market.

Alternative Claim for Relief

14. Section 21-A of the Act provides for the exemption from the tax increase on beer "produced or manufactured by persons whose total production . . . during its most recent tax year has not exceeded thirty one million (31,000,000) wine gallons . . .".

15. Sub-paragraph (A) of Section 21-A of Act 37 of July 13, 1978 establishes the procedure for exempting beer from the 55¢ tax increase, which exemption becomes effective upon the mere filing of the petition and will continue in effect until the same be denied.

16. Under the terms of Sub-paragraph (A) of Section 21-A none of the beers produced and exported by the beer producing plaintiffs to Puerto Rico qualifies for the exemption, whereas all beer produced in Puerto Rico is exempted from the higher tax.

17. The exemption of locally produced beer from the $1.60 tax effects an invidious discrimination in that it favors the beers produced in Puerto Rico over similar articles exported by the beer producing plaintiffs from the United States and taxed in Puerto Rico.

18. The exemption provided by Section 21-A of Act 37 of July 13, 1978 is invalid, null and void and unconstitutional in that it violates Article I, Section 8 of the Constitution of the

United States of America by exempting from the $1.60 internal revenue tax the beers produced in Puerto Rico, whereas similar articles produced and manufactured in the United States by the beer-producing plaintiffs are not exempted; it violates the Fifth and Fourteenth Amendments of the Constitution of the United States of America in that it denies plaintiffs due process and equal protection of the laws; it violates the Federal Relations Act, particularly 48 USC Sections 737 and 741(a), in that it discriminates against articles exported to Puerto Rico by the beer-producing plaintiffs from the United States, and in favor of similar articles manufactured in Puerto Rico.

19. The defendants, acting jointly and in concert, are empowered to but do not intend to impose and collect on the beer manufactured in Puerto Rico the additional tax that they are attempting to impose and collect on the beer manufactured by the beer-producing plaintiffs outside Puerto Rico.

20. Unless defendants are restrained from enforcing and granting the exemption provided by Section 21-A of the Act, plaintiffs will suffer great and irreparable injury in that their product will be placed on a competitive economic disadvantage vis-a-vis the local product which is exempted from the higher tax with a consequential loss of the Puerto Rican beer market.

WHEREFORE, plaintiffs respectfully pray that this Honorable Court:

(A) Render judgment declaring Act 37 unconstitutional and null and void, in the imposition of a substantially higher tax on articles exported to Puerto Rico by the beer-producing plaintiffs from the United States than that imposed on similar articles produced in Puerto Rico; or, to declare unconstitutional and null and void, Section 21-A and any other part thereof whereby articles produced in Puerto Rico are exempted from the tax imposed upon similar articles exported to Puerto Rico by the beer-producing plaintiffs from the United States, as being a violation of 48 USC Sections 737 and 741(a), Section 8 of

Article I of the Constitution of the United States of America, Section 3, Clause 2 of Article IV; Clause 2 of Article VI and the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

(B) Issue a temporary restraining order and preliminary injunction ordering the defendants, their officers, agents servants, employees and successors, and all those in active concert or participation with them to refrain immediately from putting into effect Act 37 of July 13, 1978, and from imposing or collecting the discriminatory tax of $1.60 per wine gallon authorized by that Act; or in the alternative, enjoin the defendants from imposing on and collecting from the beer produced in Puerto Rico a lower tax than the tax on beer produced by the beer-producing plaintiffs outside Puerto Rico.

(C) Issue a permanent injunction perpetually enjoining and restraining the defendants, their officers, agents, servants, employees, successors, attorney, and all those in active concert or participation with them from imposing or collecting any increased tax authorized by Act 37; or in the alternative, enjoin the defendants from imposing on and collecting from beer produced in Puerto Rico a lower tax than the tax on beer produced by the beer-producing plaintiffs outside Puerto Rico.

(D) Grant such other relief as may be warranted.

I CERTIFY that copy of the preceding Amended Complaint has been personally served upon attorney Vivian Reyes de Rodriguez at her office at the Commonwealth of Puerto Rico's Justice Department in Old San Juan, Puerto Rico.

In Carolina, Puerto Rico, this 28th day of July, 1978.

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Supreme Court, U. S.
FILED
JUL 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1747

UNITED STATES BREWERS ASSOCIATION, INC., et. al
Petitioners,

v.

JULIO CESAR PEREZ, ETC., et. al
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is set forth in Appendix E of the Petition for a Writ of Certiorari filed by the petitioner in this

case before this Honorable Court, as are the pertinent portions of the record before the Court of Appeals.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for a Writ of Certiorari.

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the Butler Act, 48 U.S.C. Sec. 872, construed akin to 28 U.S.C. Sec. 1341, deprived the district court of jurisdiction to entertain an action to invalidate and restrain a discriminatory tax exemption alleged to be in violation of the Constitution of the United States and the Federal Relations Act, 48 U.S.C. 741(a)?

Whether the provisions of the aforecited anti-injunction statute are applicable where the action does not seek to invalidate or restrain the assessment or collection of a tax?

STATUTES INVOLVED

The Federal Statutes involved are: 48 U.S.C. Sec. 872; 28 U.S.C., Sec. 1341; 48 U.S.C., Sec. 741(a). The pertinent provisions of those statutes are printed in the petition.

STATEMENT

This action for injunctive and declaratory relief was filed at the United States District Court for the District of Puerto Rico by five corporations engaged in the business of manufacturing beer for distribution and sale in interstate and foreign commerce, and by

a trade association allegedly representing the manufacturers of ninety five percent of the beer sold in the United States, (none of which were taxpayers in Puerto Rico), challenging the validity of Act 37 of July 13, 1978, enacted by the Legislative Assembly of the Commonwealth of Puerto Rico, and praying that it would not be put into effect.

The defendants were the Secretary of the Treasury Department of the Commonwealth of Puerto Rico and the Director of the Bureau of Alcoholic Beverages of the same Department, both of whom are empowered to enforce the aforementioned Act 37.

This statute increased the internal revenue tax on beer and established a procedure to exempt therefrom beer ". . . produced or manufactured by persons whose total production during its most recent year has not exceeded thirty one million (31,000.000) wine gallons".

The plaintiffs here, the petitioners, challenged the validity of this statute, claiming that its intent and effect was the protection of small local breweries, by establishing a qualification for exempting their beers from the increased tax, which beers produced in huge quantities by them could not meet, and alleging, among other things, that its effect would cause a price difference at retail level that would give local beer a competitive advantage in the local market, to the detriment of beers imported from elsewhere.

After a hearing, the United States District Court, ruled that the Court lacked jurisdiction, but being "uncertain" as to the availability and adequacy of a local remedy (Opinion and Order P. 10 Appendix A of the Petition, page 22) resolved not to dismiss the complaint, holding its equitable hand because of the

aforementioned jurisdictional limitations, while the plaintiffs seeked as they were thereby directed to do forthwith, a decision from the Commonwealth Courts "as to the issues raised in the case and particularly, concerning the existence of an adequate right of action," (Opinion and Order, p. 10, Appendix A of the Petition, page 23), declining to enjoin either the additional tax or the exemption therefrom, refusing to extend the Temporary Restraining Order, and, pursuant 48 U.S.C. 872 (Butler Act 1 L.P.R.A., Organic Act Sec. 3) and 28 U.S.C. 1341 abstained from entering into the merits of the complaint.

Plaintiffs, here the Petitioners, filed a complaint in the Superior Court of Puerto Rico alleging the same grounds as in the complaint filed in the District Court, but reserving their federal rights, they also appealed before the United States Court of Appeals for the First Circuit. Both Courts decided against them: the first one upheld the constitutionality and validity of Act 37 of July 13, 1978, dismissing the complaint on its merits, the second one remanded the case to the district court to be dismissed for want of jurisdiction.

Now the plaintiffs, here the Petitioners, have appealed before the Supreme Court of Puerto Rico which has taken the case under advisement and where the parties are awaiting its decision in any moment, while they also petitioned this Honorable Court with a writ of certiorari, on the applicability of the Butler Act to deprive the federal court of jurisdiction under the circumstances of this case.

The fact that the lack of jurisdiction to entertain the complaint pursuant to 28 U.S.C. 1341 and 48 U.S.C. 872 in respect to the section of the Act 37 which levies and additional tax to the beers is not questioned by herein petitioners, must be always born in mind. Their allegations as to the anti-injunction statutes refer only to the part of the Act 37 which exempt beers which produce less than 31 million gallons from the additional tax. They allege that the anti-injunction statutes do not limit the jurisdiction of the Federal Court when a tax exemption is involved. Nevertheless, it is clear that there is only one Act 37 and that it has several tightly interrelated sections. To allow a preliminary injunction only in respect to one of those sections, would be tantamount to a legislative act, on the part of the Federal Courts, rendering this law meaningless besides destroying the local tax scheme, and smashing the Legislative intent of the Commonwealth, since this act is also in consonance with other Government policies, and this is precisely what the Federal Court are barred from, pursuant to 28 U.S.C. 1341 and 48 U.S.C. 872.

That is why, while the existence of an adequate right of action and the availability of a speedy remedy in state courts is not any longer in controversy here because it has already been proven beyond any doubt, still it is nevertheless to be borne in mind, since pursuant to 48 U.S.C. 872 which states that "No suit for the purpose of restraining the assessment or collection of any tax imposed by the Laws of Puerto Rico shall be maintained in the United States District Court for Puerto Rico" the respondents have asserted that the state courts are the proper forum to adjudicate federal rights such as those invoked here in the instant case. See *Generally*, *Baker* v. *Alchinsen, T & Santa Fe Ry Co.*, 106 F 2d 525 (10 Cir.); *Testa* v. *Kalt*, 330 U.S. 386 (1947).

ARGUMENT

Respondents hold that the anti-injunction statutes, 48 U.S.C. 872 (Butler Act) (Organic Act Section 3) and 28 U.S.C. 1341 deprived the District Court of Jurisdiction in a suit seeking to restrain the enforcement of a tax increase, *Sancho* v. *National City Bank of N.Y.*, 112 F. 2d 998 (1 Cir. 1940); *Paul Smith* v. *Buscaglia*, 140 F. 2d 900 (C.A. 1, 1944); *Smallwood* v. *Gallardo*, 275 U.S. 56; *Paul Smith* v. *Buscaglia*, 1 Cir. 140 F. 2d (1944); *Everlasting Development Corp., et al* v. *Sol Luis Descartes*, 95 F. Supp. 954 (1951), and the granting of a tax exemption which was indeed a pivotal element in the tax scheme which provided for that increase, in such a way that, undoubtedly, the Legislature of the Commonwealth would have never enacted Act 37 without the exemption it provided from the tax increase therein levied.

Petitioners have tried to establish, semantically, that the assessment or collection of a tax does not relate at all to an exemption from it, no matter how inbred it may be as an integral and indivisible part of such a tax, being thus, this exemption, no bar to the jurisdiction of the District Court.

We deem that such an exemption, which is precisely what defines the Extension, See *Syracuse Trust Co.* v. *Board of Suprs. of Oneida County*, 13 NYS 2nd 390, the limits, and even one of the main purposes or aims of that particular tax increase, can not be viewed as if its fiscal impact and economic effect had not been duly appraised by the Legislators of the Commonwealth as a principal aspect of their tax scheme in keeping with the domestic tax policy of the state. See *Great Lakes Co.* v. *Huffman*, 319 U.S. 293 (1943); *Mathew* v. *Rodgers*, 284 U.S. 521.

Act 37 definitely to be seen as a whole. The presumption to be upheld is that the legislature intends an act to be effective as an entirety. The rule is against the mutilation of a statute and the preservation of a whole when it partakes of an indivisible character. *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1935). See also *Champling Refining Co.* v. *Corp. Com.* (1931) (286 U.S. 210); *Pollacs* v. *Farmer's Loan And Trust Co.*, 158 U.S. 601 (1884); *Williams* v. *Standard Oil Co.*, 278 U.S.; *Sprarque* v. *Thompsen*, 188 U.S. 90 (1885).

Some exemptions may bear to be defined as inmunities from a Tax Burden, while others might even be considered to be the very soul of a Tax Scheme, a sine-qua-non element, without which the rest would not make much sense any longer, and in this respect, the assessment, appraisal or evaluation of such an exemption has to be definitely considered as bearing in the assessment, levying and collection of the tax to which it applies.

So, the District Court, pursuant to the Butler Act, lacked jurisdiction to entertain the instant action, inasmuch as it concerned a restraint on the assessment of a tax and the exemption provided from it.

Now, pursuant to the other anti-injunction statute cited by the petitioners, 28 USC 1341, The District Court also lacked jurisdiction to entertain the instant case, (See *Mathew* v. *Rodgers*, 284 US 521 (1932); *Boise Water Co.* v. *Boise City*, 213 U.S. 276; *Shelton* v. *Platt*, 139 U.S. 591; *Dows* v. *Chicago*, 11 Wall. 108, 110, 112; *Tulley* v. *Griffin*, 429 US 68 (1976), inasmuch as the only condition it imposes (not specified in the akin but more barring Butler Act) that is, the availability of a plain, speedy and efficient remedy in the Courts of a state, (See *Cafeteros de Puerto Rico*

v. *Treasurer*, 74 PRR 704, 715 (1953); *Cooperativa Cosecheros de Cafe* v. *Treasurer*, 69 PRR 210 (1948); *Fernandez* v. *Buscaglia*, 60 PRR 582 (1942); *Benitez* v. *Sancho Bonet*, 54 DPR 751; *Los Diablos de la Plaza* v. *Sancho Bonet*, 54 DPR 751 (1939); *E. Sole & Cia.* v. *Sancho Bonet*, 53 DPR 762 (1938); *The Texas Co.* v. *Domenech*, 50 DPR 432 (1932); *Durlach Brothers, Inc.* v. *Domenech*, 47 DPR 654 (1934)), was met here in this case, as proven by the fact that the Superior Court of the Commonwealth already has considered the case on its merits, settling the constitutional questions presented before it, in its Opinion and Order of December 12, 1978. (Appendix D of the Petition) of which the petitioners have appealed before the Supreme Court of the Commonwealth of Puerto Rico.

The respondents consider also that the District Court lacked jurisdiction to entertain this case, because the Twenty First Amendments of the Constitution of the United States allows the states, territories or possessions to absolutely regulate, taxwise or otherwise, the importation of intoxicating liquors, without any restrictions.

The United States Congress granted the Legislature of Puerto Rico power to levy internal revenue and taxes, and Act 37 did not violate its limiting proviso; that no discrimination be made.

The assailed exemption from the tax increase enacted, was based solely on a criteria of volume of production and it was never shown that such criteria with antitrust leanings violated Section 3 of the Federal Relations Act, or even that it partaked or a discriminatory nature at all. It was just designed to foster competition and avoid placing an unbearable

burden on small breweries, since the required yearly volume of production is considerably less than the minimum output that is considered necessary for a successful operation of a Brewery, thus, it can not be described as arbitrary, unreasonable or capricious, since it tends to foster the interests of the state by helping to prop-up bound-to-fail concerns, whose survival as job sources is important to the Commonwealth (as a socio economic stabilizing factor), and whose very presence as viable participants would tend to promote desirable competition in that field of industry and commerce.

The fact that almost half of all members of the United States Brewers Association qualify for the tax exemption provided for in Act 37, as well as many other foreign ones, show how this exemption was not tailored, as claimed, to fit only the local ones.

Thus the alleged discrimination has been belied by the fact that as to this date, the foregoing and stateside breweries enjoying the benefits of such tax exemption outnumber the local ones, a situation that only underlines what was already obvious to the District Court.

This in an action for declaratory and injunctive relief may we respectfully ask: Relief from What?

The local beer industry originated in 1934 and in forty years it had already lost 60% of its breweries. In fact, ten years had passed since anyone tried last, and unsuccessfully of course, to start locally a new brewery. That industry came to employ about 20% less people than it did then. The two small remaining local breweries shared only 26.5% of the local market

at the time Act 37 was enacted and the trend was downward (about 5% each year for the last 15 years).

After the enactment of Act 37, imported beers have continued to dominate the Puerto Rican Market, which has proven itself to be so as predictable that, for example, in spite of the new price structure, during the last November, local beer sales decreased by almost 6% when compared with last year's figures.

So we could conclude that about the only damage that Act 37 could bring upon the appellants, would be to reduce somewhat their unwholesome chance to capture 100% of the local market. An improbable damage that is not only uncertain, but that in any case would be beneficial to the general public of consumers unasmuch as competition is deemed to be healthy and convenient in our free enterprise system.

Thus, considering all the above, we can only but summarize that the Butler Act effectively deprived the federal court of jurisdiction under the circumstances of this case.

It is therefore manifest that there is no conflict of decisions nor an important question of Federal law requiring a decision by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

At San Juan, Puerto Rico, July 11, 1979

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